

SUPREME COURT OF THE STATE OF NEW YORK

IN SENATE

No. 411

JOHN D. BOND AND PLAINTIFFS IN ERROR

vs.
STEWART WOODS, FOLKLE COMMISSIONER OF THE CITY
OF NEW YORK

ON WRIT OF HABEAS CORPUS OF THE COURT OF APPEALS OF THE STATE OF
NEW YORK

FILED JANUARY 2, 1911

(28,072)

(26,078)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 611.

JOHN D. IRELAND, PLAINTIFF IN ERROR,

vs.

ARTHUR WOODS, POLICE COMMISSIONER OF THE CITY
OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW
YORK.

INDEX.

	Original.	Print
Caption	<i>a</i>	1
Clerk's return to writ of error.....	<i>b</i>	1
Remittitur from Court of Appeals.....	<i>c</i>	2
Papers on appeal to the Court of Appeals.....	1	3
Notice of appeal	1	3
Order appealed from	2	3
Writ of <i>habeas corpus</i>	3	4
Petition for writ of <i>habeas corpus</i>	4	4
Exhibit A—Warrant	7	6
Return to writ of <i>habeas corpus</i>	9	7
Traverse to return	10	7
Colloquy between court and counsel.....	13	9
Testimony of John D. Ireland.....	15	10
Adele Carpenter	42	26
Cecilia H. Lawson	49	33
Henry Goldstein	56	38

	Original.	Print
Testimony of John D. Ireland (recalled).....	78	51
Frank H. Keeler.....	89	58
Laurence R. Prior	90	59
Adella Seward	92	61
Laura Ireland Junod.....	94	62
George Coghill	97	65
Helen M. Campbell	99	66
Margaret Lawson	101	68
Colloquy between court and counsel	106	72
Testimony of William Elmer Brown, Jr.....	127	82
Colloquy between court and counsel	127	82
Testimony of Laurence R. Prior	131	84
Plaintiff's Exhibit A—Requisition papers, marked as one exhibit, but including requisition, Letter of prosecutor of Atlantic County, N. J., to Governor of New Jersey requesting issuance of requisition	135	87
Indictment	136	88
Affidavit of Charles N. Apple.....	138	89
Affidavit of Charles N. Apple.....	157	99
Respondent's Exhibit 1—Check on Little Falls National Bank	160	101
Respondent's Exhibit 2—Check on Little Falls National Bank	160	101
Stipulation settling case	161	101
Order settling case	161	101
Waiver of certification	162	102
Affidavit of no opinion	162	102
Order of appellate division affirming order dismissing writ.	163	102
Notice of appeal to Court of Appeals	164	103
Opinion of appellate division, Shearn, J.....	166	104
Waiver of certification	169	106
Petition for writ of error	170	106
Order allowing writ of error	174	108
Writ of error	179	109
Citation and service	184	111
Assignment of errors	186	111
Clerk's certificate	190	112

a Filed Mar. 31, 1917.

Court of Appeals of the State of New York.

The People of the State of New York on the Relation of JOHN D.
IRELAND, Relator-Appellant,

against

ARTHUR WOODS, as Police Commissioner of the City of New York,
Defendant-Respondent.

PAPERS ON APPEAL.

Henry Goldstein, Attorney for Relator-Appellant, 37 Liberty
Street, Borough of Manhattan, New York City.

Edward Swann, District Attorney, Attorney for Defendant-Re-
spondent, Criminal Courts Building, Borough of Manhattan, New
York City.

Filed Mar. 31, 1917.

b STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the Judges of the United States Supreme Court:

The Judges of the Court of Appeals of the State of New York, do
hereby make answer and return to the writ of error issued herein to
said court by attaching hereto a transcript of the record and judg-
ment of this court, in the case of The People of the State of New
York on the Relation of John D. Ireland, Relator-Appellant, against
Arthur Woods, as Police Commissioner of the City of New York,
Respondent, together with all things touching the same, which we
certify and return under the seal of our said court to the Supreme
Court of the United States and the Judges thereof, as we are herein
commanded.

In witness whereof, I have hereunto set my hand and affixed my
official seal at the City of Albany, this twenty-third day of July,
A. D., one thousand nine hundred and seventeen.

[Seal State of New York Court of Appeals.]

R. M. BARBER,

Clerk of said Court,

By WM. J. ARMSTRONG, *Deputy.*

c

Court of Appeals.

STATE OF NEW YORK, 88:

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 11th Day of July in the Year of Our Lord One Thousand Nine Hundred and Seventeen, Before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER, *Clerk*.

Remittitur July 12, 1917.

d

The People, &c., ex Rel. JOHN D. IRELAND, Appellant,
ag't

ARTHUR WOODS, as Police Commissioner, &c., Respondent.

Be it Remembered, That on the 31st day of March in the year of our Lord one thousand nine hundred and seventeen, John D. Ireland the appellant in this cause, came here into the Court of Appeals, by Henry Goldstein, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Arthur Woods, as Police Commissioner, &c., the respondent in said cause, afterward appeared in said Court of Appeals by Edward Swann, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

e

Whereupon, the said Court of Appeals having heard this cause argued by Mr. George W. Wickersham of counsel for the appellant, and by Mr. Robert S. Johnstone, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

f

Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,

*Clerk of the Court of Appeals of the
State of New York.*

Court of Appeals, Clerk's Office.

Albany, July 12, 1917.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal State of New York Court of Appeals.]

R. M. BARBER, *Clerk*.1 *Notice of Appeal.*

New York Supreme Court, Appellate Division, First Department.

The People of the State of New York ex Rel. JOHN D. IRELAND,
Plaintiff-Appellant,
against

ARTHUR WOODS, Police Commissioner of the City of New York.

Please to take Notice:

That the relator, John D. Ireland, hereby appeals to the Appellate Division of the Supreme Court for the First Department, from an order of the Hon. Mr. Justice Giegerich made and entered in the office of the Clerk of the County of New York on the 10th day of July, 1914, and from each and every part of said order, which denied and vacated a certain writ of habeas corpus theretofore obtained.

Dated, New York City, July 10th, 1914.

Yours, etc.,

HENRY GOLDSTEIN,
Attorney for Appellant.

37-39 Liberty Street, N. Y. City.

To Dist. Atty., N. Y. County; Police Comm. of N. Y. City; Clerk
of N. Y. County.

2 *Order Appealed From.*

New York Supreme Court, County of New York, Special Term,
Part II.

Present: Hon. Leonard A. Giegerich, Justice.

The People of the State of New York ex Rel. John D. Ireland
Relator,
against

POLICE COMMISSIONER OF THE CITY OF NEW YORK, Defendant.

The following papers used on this motion:

Petition (on file)
 Writ of Habeas Corpus
 Return to Writ of Habeas Corpus
 Traverse to Return
 Stenographer's Minutes of Testimony Taken Upon the
 Hearing of This Writ, and Exhibits.....
 Papers and Proceedings Constituting Requisition of Gov-
 ernor of the State of New Jersey, Upon Which the Gov-
 ernor of the State of New York Issued his Rendition War-
 rant

Upon the foregoing papers this writ is dismissed and the relator is
 remanded, with directions to the Police Commissioner of the
 3 City of New York to deliver over the relator to the duly
 authorized agent of the State of New Jersey.

Dated July 10, 1914.

L. A. G., J. S. C.

Writ of Habeas Corpus.

The People of the State of New York to Arthur Woods, as Police
 Commissioner:

We command you, that you have the body of John D. Ireland, by
 you imprisoned and detained, as it is said, together with the time and
 cause of such imprisonment and detention, by whatsoever name the
 said John D. Ireland is called or charged, before the Supreme Court
 at Special Term, Part II thereof, to be held at the County Court
 House in the County of New York at 10:30 o'clock in the forenoon
 on the 7th day of July, 1914, to do and receive what shall then and
 there be considered, concerning the said John D. Ireland. And
 have you then there this writ.

Witness one of the Justices of the said Court the first day of July,
 1914. Writ allowed.

[SEAL.]

SAMUEL GREENBAUM,
Justice of the Supreme Court.

By the Court,

WM. F. SCHNEIDER, *Clerk.*

Petition for Writ.

New York Supreme Court, New York County.

The People of the State of New York ex Rel. John D. Ireland
 against

ARTHUR WOODS, Police Commissioner of the City of New York.

To the Supreme Court of the State of New York:

The petition of John D. Ireland respectfully shows to the Court:
 That he is imprisoned and restrained in his liberty at Police Head-

quarters in the City of New York by Arthur Woods, Commissioner of Police of the City of New York.

That he has not been committed and is not detained, by virtue of any judgment, decree, final order or process or by virtue of any mandate, issued by a Court or a Judge of the United States, in a case where such Courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceeding in such a Court.

That he has not been committed, and that he is not detained, by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause except to punish him for contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

That the cause or pretence of the imprisonment or restraint of your petitioner, according to the best of his knowledge and belief, is by virtue of an arrest made in pursuance of an executive warrant issued by the Hon. Martin H. Glynn, Governor of the State of New York, upon a requisition from the Governor of the State of New Jersey, said warrant reciting that your petitioner has been indicted in the State of New Jersey for the crime of ———, and that your petitioner was a fugitive from the justice of the State of New Jersey. A copy of said warrant is hereto annexed and marked Exhibit A.

That your petitioner's arrest and imprisonment are illegal, and that he is unlawfully restrained of his liberty in that he is restrained of his liberty in violation of the provisions of Subdivision 2 of Section 2 of Article IV of the Constitution of the United States, and of Section 5278 of the Revised Statutes of the United States, in this that the executive warrant, under which he is now restrained, shows that the crimes with which he is charged were committed in the State of New Jersey; that the papers accompanying the requisition of the Governor of New Jersey are not authenticated as required by that act; that it nowhere appears that your petitioner was personally within the limits of the State of New Jersey at the time said alleged crimes are stated to have been committed; that the Governor of the State of New York had no jurisdiction to issue his warrant in that it did not appear before him that your petitioner was a fugitive from the justice of the State of New Jersey or had fled therefrom; that it did not appear that there was any evidence before the Governor of the State of New Jersey at the time he issued his demand that your petitioner was within the limits of the State of New Jersey when the crimes were alleged to have been committed; that it appears on the face of the indictment accompanying the requisition of the Governor of New Jersey that no crime under the laws of New Jersey is charged or has been committed; that your petitioner was not within the limits of the State of New Jersey at any of the times when the crimes charged in the indictment or any of them were committed.

Wherefore, your petitioner prays that a writ of habeas corpus issue, directed to Arthur Woods, as Commissioner of Police of the City of New York, commanding him that he have the body of your peti-

tioner, John D. Ireland, by him imprisoned and detained, together with the cause of such imprisonment and detention, before a Special Term of the Supreme Court, Part II thereof.

Dated, New York, July 1, 1914.

JOHN D. IRELAND,
Petitioner.
HENRY GOLDSTEIN,
Attorney for Petitioner.

37 Liberty Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

John D. Ireland, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has
7 read the same and knows the contents thereof, and that he believes it to be true.

JOHN D. IRELAND.

Sworn to before me this 1st day of July, 1914.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

EXHIBIT A.

STATE OF NEW YORK,
Executive Chambers:

The Governor of the State of New York to the Police Commissioner of the City of New York and the Sheriffs, undersheriff and other officers of and in the several cities and counties of this State authorized by Subdivision One of Section 827 of the Code of Criminal Procedure to execute this warrant:

It having been represented to me by the Governor of the State of New Jersey, that J. D. Ireland stands charged in that State with having committed therein in the County of Atlantic the crime of conspiracy which the said Governor certifies to be a crime under the Laws of said State, and that the said J. D. Ireland has fled therefrom and taken refuge in the State of New York and the said Governor of the State of New Jersey having pursuant to the Constitution and laws of the United States demanded of me that I cause the said J. D. Ireland to be arrested and delivered to Charles N. Apple who is duly authorized to receive him into his custody and convey him back to the said State of New Jersey, which said demand is accompanied by a copy of an indictment and other papers, duly certified by the said Governor of the State of New Jersey, to be authentic and duly authenticated and charging the said J. D. Ireland with having committed the said crime and fled from said State and taken refuge in the State of New York.

8 You are hereby required to arrest and secure the said J. D. Ireland wherever he may be found within this State and thereafter and after compliance with the requirements of Section 827 of the Code of Criminal Procedure to deliver him to the custody of the said charge of said Charles N. Apple to be taken back to the said State from which he fled pursuant to the said requisition and also to return this warrant and make return to the Executive Chamber within 30 days from the date hereof of all your proceedings had thereunder and of all facts and circumstances relating thereto.

Given under my hand and privy seal of the State at the Capitol in the City of Albany, this 29th, day of June, in the year of our Lord, one thousand nine hundred and fourteen.

By the Governor,

MARTIN H. GLYNN.

FRANK A. TIERNEY,

Secretary to the Governor.

9 *Return.*

The undersigned, Police Commissioner of the City of New York, respectfully returns and says, that he received the annexed papers marked "A" on the 1st day of July, 1914, at 12 o'clock, noon at which time there was in his custody the body of John D. Ireland, whom he believes to be the person named in said paper marked "A," and who was so in his custody as being the person named in an original paper of which the annexed paper marked "B" is a copy (and the original whereof he now produces).

And so returning, the undersigned produces the body of said person, in obedience to the command expressed in Paper "A."

New York, the 7th day of July, 1914.

ARTHUR WOODS.

Police Commissioner of the City of New York.

Exhibit "A" annexed to the return is the writ of habeas corpus, printed herein at page 3.

Exhibit "B" annexed to the return is the warrant issued by Governor Glynn, printed herein at page 7 as an exhibit annexed to the petition for the writ.

10 *Traverse to Return.*

Supreme Court, New York County.

People ex Rel. JOHN D. IRELAND

against

ARTHUR WOODS, as Police Commissioner, etc.

STATE OF NEW YORK,

County of New York, ss:

John D. Ireland, being duly sworn, deposes and says:

That he denies that he committed the crime of conspiracy, fraud

or obtaining money under false pretenses or any other crime in the State of New Jersey, or elsewhere. That he denies that he was within the State of New Jersey at the times mentioned in the indictment upon which the requisition of the Governor of New Jersey was issued and upon which the warrant of the Governor of the State of New York was issued; and that said indictment charges him with the crime of conspiracy, fraud and obtaining money under false pretenses on the 1st day of January, 1913; the 9th day of June, 1913, and the 12th day of July, 1913. Deponent says that he was not within the State of New Jersey at any such times and that he was not within the State of New Jersey at any of the times when said alleged crimes were committed, nor at the time of the finding of said indictment. Deponent further says that he is not a fugitive from the State of New Jersey, and that he has

11 not fled from said State.

Deponent further says that he has examined a sworn copy of the requisition of the Governor of New Jersey to the Governor of New York, and that said papers do not contain any evidence or proof that said John D. Ireland was in the State of New Jersey on any day in any of the months set forth in said indictment.

JOHN D. IRELAND.

Sworn to before me this 7th day of July, 1914.

THOMAS H. SEE,
Notary Public, 2254, New York County.

12 New York Supreme Court, New York County, Special Term,
Part II.

Before Hon. Leonard A. Geigerich, J.

The People of the State of New York ex Rel. JOHN D. IRELAND,
Relator,
against

ARTHUR WOODS, Police Commissioner of the City of New York,
Defendant.

New York, July 8th, 1914.

Appearances:

Henry Goldstein, Esq., for Relator, and Arthur C. Patterson, Esq., of Counsel.

William Elmer Brown, Jr., Esq., Assistant Prosecutor of the Pleas, Atlantic County, New Jersey, for the State of New Jersey.

Stanley L. Richter, Esq., Deputy Assistant District Attorney, New York County, for the State of New York, and

Mr. Johnstone, of Counsel.

Mr. Richter: On behalf of the Police Commissioner of the City of New York, I submit our return, which shows that the relator is held

as a fugitive from justice, from the State of New Jersey, in which State he is charged with conspiracy.

13 The Court: The question of identity, merely, I believe?

Mr. Richter: No, I think not; counsel concedes the identity.

The Court: What is the question?

Mr. Patterson: If your Honor please, I have prepared here a traverse, which I have not had a chance to have verified, which shows that the relator was not within the State of New Jersey at the time any of the alleged crimes were committed.

The Court: Is that the point to be raised in these proceedings?

Mr. Patterson: Yes, sir.

Mr. Richter: It may be raised, your Honor. Of course the Courts invariably abide by the Governor's decision, on a question of this sort; and in a question that the Governor was called upon to decide the Courts do not overrule the Governor hastily.

Mr. Patterson: Of course it is not necessary for me to say that I will submit authorities to show that the Court has ample authority to review the matter *de novo*.

If your Honor please, I offer in evidence sworn copy of the requisition of the Governor of the State of New Jersey and the papers annexed thereto.

Mr. Richter: Your Honor, of course those papers must be received; but I don't think they should be received by themselves. There was an oral hearing before the Governor of this State, and certain testimony was taken, and certain concessions were made; and if any of the papers before the Governor are going into this record, I submit, all of them should. If counsel is prepared to make the same concessions here which he made before the Governor, then I am

14 perfectly willing that these papers should be received; but he cannot pick out part of what was before the Governor and keep out the rest.

Mr. Patterson: If your Honor please, no witnesses were sworn before the Governor. There was an oral argument. I have sought from the Governor, or his Executive Secretary, Mr. Potter, the papers on file in their office, with respect to this matter, and those are the papers that have been furnished me, and are the only papers recited in the Governor's warrant.

The Court: You may offer what you see fit and the other side may put in what they see fit.

Mr. Richter: May I say one word before that ruling?

The Court: Yes.

Mr. Richter: The question before your Honor is, whether the Governor had any evidence before him to warrant him in issuing this warrant. In other words, the question is, as to whether the relator was charged with a crime in the State of New Jersey; and secondly, whether he was actually in the State at the time the crime was committed.

When the hearing was had before the Governor, counsel made certain concessions in reference to the presence of this man in the State of New Jersey, and in support of his traverse he is bound to show your Honor what the Governor had before him. He has made the claim

that what was before the Governor was insufficient. In order to show that, the burden is upon him to show what was before the Governor, and not part of it, but all of it.

I understood from Mr. Patterson, before the argument, that he was going to place the same concessions on this record that he made before the Governor, and that would save us the time of calling
15 all these witnesses. I don't think there is any necessity for it.

I am going to rest on the papers that were before the Governor.

Mr. Patterson: If your Honor please, I am now offering this record. That is the only record, I understand and believe, on file in the office of the Governor.

The Court: I overrule the objection in order to bring the matter to a head.

The same received in evidence and marked Exhibit "A."

JOHN D. IRELAND, the relator, called in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Mr. Ireland, where do you reside?

A. 104 East 73rd Street.

By the Court:

Q. Borough of Manhattan, New York City?

A. Yes, sir.

By Mr. Patterson:

Q. How long have you lived in the City of New York, Mr. Ireland?

A. All of my life.

Q. Were you ever in Atlantic City, New Jersey?

A. Yes.

Q. When?

A. In the Spring of 1911.

The Court: Atlantic City, New Jersey?

Mr. Patterson: Yes.

By the Court:

Q. When?

A. In the Spring of 1911.

By Mr. Patterson:

Q. Have you ever been there since?

A. Never.

16 Q. Where were you on or about the 1st day of January, 1913?

A. New York City.

By the Court:

Q. You mean Borough of Manhattan?

A. Borough of Manhattan.

By Mr. Patterson:

Q. For a week or so before and after that date, where were you?

A. New York City; Borough of Manhattan.

Q. Where were you during the month of January, 1913?

A. New York City; Borough of Manhattan.

Q. Now, coming down to about the 1st of June, 1913, where were you?

The Court: Is that the time that this is alleged to have taken place?

Mr. Patterson: One of the dates is the 9th of June, your Honor.

A. Will you repeat your question, please?

Q. Coming down to about the 1st of June, 1913, where were you?

A. New York City, Borough of Manhattan.

Q. And how long after about the 1st of June did you remain in the Borough of Manhattan?

A. Most a month; nearly all of the month.

Q. Well, during the week of the 1st of June, say, up to the 7th and 8th of June, where were you?

A. Up to when?

Q. To the 7th and 8th of June?

A. New York City, Borough of Manhattan.

Q. Where were you on the 7th and 8th of June?

A. I was in New York City, and went to Garden City and played golf.

Q. To the Garden City Golf Club?

A. Yes.

Q. You were there on the 7th and 8th?

A. Yes, sir.

17 Q. Did you play golf most of the day at Garden City Golf Club on the 7th of June?

A. In the afternoon of the 7th and all of the 8th.

Q. And when did you return to New York on the 8th?

A. Evening or late afternoon of the 8th.

Q. What did you do then?

A. I went to the University Club and saw Mr. Coggill—George Coggill, and dined there.

Q. After dinner what did you do?

A. I stayed there.

Q. Where were you on the 9th of June?

A. In New York City.

Q. What did you do that day, do you recall?

A. On the 8th of June in the evening I went to see my family; they were going to leave on the following day. I went to spend the evening with them.

Q. Where did you go to see your family on the 8th of June?

A. 104 East 73rd Street, where they lived.

Q. Did you see them again before they left?

A. Yes; I saw them on the evening of the 9th.

Q. Whereabouts were they when you saw them on the 9th?

A. At their house. My father is an old gentleman, and I wanted to see him, he was going away next day for the Summer.

Q. Did you see them after you saw them on the 9th?

A. What is that?

Q. After you saw your family on the 9th, did you see them again?

A. On the morning of the 10th I saw them off on the Albany day boat.

Q. Now, during that week, Mr. Ireland, which began the 8th of June, where were you?

A. Beginning the 8th of June?

Q. Sunday, the 8th, considering that week, where were you during the following week?

A. I was in New York all that week.

18 Q. Until when?

A. Until the following Saturday and Sunday.

Q. Where were you on Saturday and Sunday, the 14th and 15th of June, 1913?

A. 14th and 15th of June, 1913?

Q. Please repeat the question, Mr. Stenographer.

(Question repeated.)

A. On the evening of the 13th of June I left for Boston—went to Boston, spent the day in Boston, and went to Biddeford Pool, Maine, on the evening of the 14th, and was there on the 14th.

Q. You say you went to Biddeford Pool on the 14th?

A. Yes, sir.

Q. How long did you remain at Biddeford Pool?

A. I was there the 13th and 14th.

Q. I beg your pardon.

A. I was there the 14th and 15th, at Biddeford Pool.

Q. Biddeford Pool, Maine?

A. Yes, sir.

Q. When did you leave Biddeford Pool, Maine?

A. On the evening of the 15th.

Q. Then where did you go?

A. I came back to New York.

Q. And where were you during the remainder of the week beginning June 14th?

A. I was in New York.

Q. Throughout that week?

A. Until the 18th of June.

Q. What did you do on the 19th of June?

A. On the 19th of June I went to Seabright, New Jersey.

Q. At what time?

A. I left in the late afternoon on the boat for Sandy Hook.

Q. And went by Sandy Hook?

A. Yes, sir; about 6:40 or 5:45 or 6:00 o'clock.

Q. And what time did you arrive at Seabright?

A. A little before dinner.

19 By the Court:

Q. Seabright? That is Coney Island or Seabright, New Jersey?

A. Yes, sir.

The Court: On what day?

Mr. Patterson: 19th of June.

By Mr. Patterson:

Q. About what time did you arrive there?

A. At seven o'clock.

Q. What took you to Seabright?

Mr. Richter: That is objected to your Honor, for the following reason: The only question before your Honor is as to whether he was actually present in the State of New Jersey on one of the dates on which he is charged with having committed a crime there. Now, he cannot come before your Honor here with any defense to show while he was in New Jersey he did not take part in any alleged offense, he cannot justify his going there.

The Court: Simply, the question is here, whether or not he was in the State of New Jersey.

Mr. Richter: He is not permitted to go into the question of defense. He cannot state that for instance he went to see his wife or children or some other reason.

Mr. Patterson: If your Honor please, this is not one of the dates charged in the indictment.

The Court: If that is so, I sustain the objection.

Mr. Richter: On that subject, your Honor, we would like to say that we claim that, as a matter of law, if he was in the State of
20 New Jersey between the dates alleged in the indictment as the dates when the conspiracy was taking place, as the blanket charge here of conspiracy extends over a long period of time, if he was in the State of New Jersey on any one of those occasions, he must be extradited and put to his defense in the State of New Jersey and not here before your Honor.

Mr. Patterson: That is a very important point in this case, and one upon which I would like to be heard.

The Court: You are being heard now, sir.

Mr. Patterson: I mean on this point of evidence.

The principal authority with which I am familiar on this point is the case of *ex parte Hoffstott*, which I think is in 180 Federal, in which the question as to whether an alleged fugitive from justice can be extradited from one state to another under the charge of conspiracy arose, and that was considered in that case, and it was held and ruled that the alleged fugitive had a right to show the circumstances under which he was within the state; because it was held that he was not a fugitive from justice unless he were within the state under such circumstances as to show or give rise to the reasonable inference that he was engaged in furthering the conspiracy.

The Court: Where is that case?

Mr. Patterson: 180 Federal.

The Court: We will send for it. 180 Federal Reporter—what page?

Mr. Patterson: 240, I think, your Honor. There is another case——

The Court: We will send for it, too.

21 Mr. Patterson: The other case I would like to call your Honor's attention to in this connection is the case of Hyatt in 172 New York, 176.

The Court: Are those the two cases you want me to send for?

Mr. Patterson: Yes, your Honor.

The Court: I will send for them now.

Mr. Patterson: I may say, if your Honor will permit me, that in the Hyatt case, this very question was raised, and I don't know whether it will appear in the case, but it appears in the record on appeal. The question was asked the relator in the Hyatt case what took him into a certain jurisdiction. The objection was overruled, and the answer was allowed. That appears in the record on appeal.

The Court: Go on with another point.

Q. How long were you in Seabright on this occasion?

A. Over night.

Q. When did you leave?

A. Early the following morning, about six or seven o'clock, the following morning, by the early morning boat train.

Q. During that time, of this visit, were you anywhere else than in Seabright?

A. No.

Q. Now when you arrived at Seabright, were you met by anybody at the train?

A. I was.

Q. By whom?

A. A Miss Carpenter.

Q. Were you visiting anyone there?

Mr. Richter: That is objected to, your Honor, on the ground it is entirely immaterial for the same reason cited in my former objection.

The Court: That is involved in the other. We will waive that for the moment.

Q. What did you do after arriving at the station?

22 Mr. Richter: That is objected to, your Honor.

The Court: I will allow the question, what did he do.

A. I went with Miss Carpenter and I dined with the family.

Q. Where did you spend the evening?

A. With the Carpenters.

Q. And then what did you do?

A. Went to bed.

Q. And when did you leave Seabright?

A. Early the following morning.

Q. Between the time when you testified you reached Seabright and until you took the train to New York, did you go anywhere else?

- A. No.
- Q. You remained at Seabright all the time?
- A. Yes, sir.
- Q. What time did you leave Seabright?
- A. I think it was about six o'clock in the morning, the very early train.
- Q. And returned where to?
- A. To New York City.
- Q. By what route?
- A. The Sandy Hook route.
- Q. Where were you the balance of that month?
- A. New York City, Borough of Manhattan.
- Q. Did you go to Garden City during that time?
- A. Yes.
- Q. New York?
- A. Yes, sir.
- Q. To the golf club?
- A. Yes, sir.
- Q. When did you next leave New York?
- A. I next left New York on the evening of the 2nd of July.
- Q. And where did you go?
- A. I went to Boston.
- Q. How long were you in Boston?
- A. I was in Boston the 3d, on the afternoon of the 3d; then I went to Biddeford Pool.
- Q. Maine?
- A. Yes.
- Q. How long did you remain in Biddeford Pool?
- 23 A. The 4th and part of the 5th. Then I went to York Harbor to visit some friends.
- Q. York Harbor, Maine?
- A. Yes, sir.
- Q. When did you leave there?
- A. I left there the evening of the 6th.
- Q. Then where did you go?
- A. I returned to New York.
- Q. How long were you in New York?
- A. Continuously.
- Q. Where were you on the 12th of July?
- A. I was in New York in the morning and in the afternoon I went to Garden City and played golf.
- Q. Garden City, Long Island?
- A. Yes, sir.
- Q. Where were you on the 13th of July?
- A. Also in Garden City.
- Q. Where were you on the 14th?
- A. In New York.
- Q. And between your return from York and the 12th of July, where were you—your return from York on the 6th to the 12th of July, where were you?
- A. New York City.

Q. Where were you from the 14th of July on, during the remainder of July?

A. I was in New York City.

Q. And where were you during August?

A. I went out of town the last of July, or next to the last day of July.

Q. Where did you go then?

A. I went to Seabright, New Jersey.

Q. What route did you take?

A. Sandy Hook route.

Q. And what time did you go?

A. I went late in the afternoon, about six o'clock.

Q. And what time did you arrive?

A. About a little after seven.

Q. Were you met by anyone at the station?

A. Yes.

24 Q. By whom?

A. I was met by some of the Carpenter family.

Q. And then what did you do?

A. I went with them and dined with some friends of theirs.

Q. When you left the house of their friends, what did you do?

Mr. Richter: I object to that, your Honor. Your Honor ruled that that should be excluded temporarily, what he had done there.

The Court: Where?

Mr. Richter: In New Jersey.

The Court: He has these cases now.

Mr. Richter: He has not shown them to your Honor, they have not been shown to you yet.

The Court: They have been just handed to him.

Mr. Patterson: Your Honor allowed me on the previous question when Mr. Ireland was in Seabright, to show what he did. That objection was raised and your Honor ruled in my favor.

Q. After you left the house of these friends, what did you do?

A. I returned—went back.

Q. Went home to the Carpenters'?

A. Yes.

Q. And then what did you do?

A. Went to bed; returned to New York the following morning.

Q. Speak loudly; we do not hear you?

A. I went to bed and returned to New York the following morning.

Q. What time did you leave for New York?

A. About six o'clock, or half-past six, very early morning train.

Q. What route did you take to get back?

A. Sandy Hook route.

Q. When did you arrive in New York?

A. About half-past eight or nine o'clock.

25 Q. Now, where *where* were you from that time on during August?

A. In August?

Q. During August?

The Court: What year?

Mr. Patterson: 1913.

A. I was in New York; and I again went to Seabright the early part of August.

Q. About what time did you go down there?

A. Late in the afternoon.

Q. What route did you take?

A. The Sandy Hook route.

Q. Were you met there at the station by anyone?

A. Yes.

Q. By whom?

A. By some of the Carpenter family.

Q. And then what did you do?

A. I took dinner with them.

Q. How did you spend the evening?

Mr. Richter: I object to that, your Honor, the same objection as I raised before.

The Court: Have you the authorities there now, Mr. Patterson.

Mr. Patterson: Yes, your Honor. The Hoffstot case was one in which Mr. Hoffstot was indicted in Pennsylvania for a conspiracy to bribe certain city officials as to which banks deposits should be placed in. It was alleged he was concerned in the conspiracy; and there was evidence before the Grand Jury that indicted him, as appears from the opinion of Judge Holt, that he was within the state when certain overt acts, certain acts in furtherance of this conspiracy were charged to have occurred; and it was held that as Mr. Hoffstot was within the state some days before the alleged date of the conspiracy—and as there was evidence to connect him at that
26 time or to show that there were acts in pursuance of that conspiracy committed at that time,—he was surrendered.

In the opinion rendered by Governor Hughes at that time, Governor Hughes placed his decision largely upon the ground that Hoffstot was within the State of Pennsylvania at such time and under such circumstances that under the evidence it might be inferred he was concerned in the crime.

The Court: What was the charge there in that case?

Mr. Patterson: The charge there was conspiracy to bribe.

The Court: To bribe?

Mr. Patterson: To bribe. Now I have before me, if your Honor please, an opinion rendered by Governor Fort, of New Jersey, in the extradition case of J. Ogden Armour, a very similar case to this, and this point arose. J. Ogden Armour and others were indicted in Hudson County, for a conspiracy to raise the prices of the necessities of life. The District Attorney of Hudson County applied to Governor Fort to issue a requisition to the Governor of Illinois, where Armour then lived, requiring his rendition to the State of New Jersey, to meet this charge. I assume that the indictment was framed under this very statute, but I do not know as it doesn't ap-

pear from the record, but it was a conspiracy in New Jersey. It appeared that during the time alleged in the indictment that this conspiracy was going on, Armour had been at Hoboken, taken ship and gone to Europe and come back again; and the Governor
27 held that that was not a sufficient presence within the demanding state to constitute him a fugitive from justice, and in the course of his opinion——

The Court: The simple question is, whether or not in this case, evidence can be adduced as to what the accused did while in the State of New Jersey.

Mr. Patterson: What his purpose was in going there, that is the question I asked.

The Court: I know, but we can't go into the guilt or innocence of this relator upon this hearing. The simple question is: Was he within the jurisdiction?

Mr. Patterson: No, excuse me, if your Honor please, may I interrupt. In this case, I am now stating, this Armour case, it was held that there may be a presence in the State which is not such a presence as to render a man a fugitive from justice if he leaves. That was distinctly held by Governor Fort. I have to show and I want to show——

The Court: That does not touch upon the point that we have under discussion.

Mr. Patterson: Yes, sir; excuse me—I am entitled to show what the character of his presence was; for Judge Holt himself in the Hoffstot case, and, if Hoffstot had been going through in a train or perhaps for temporary purposes, he would feel no doubt that the man was not a fugitive from justice. I will read your Honor from this opinion:

“If the only evidence of Hoffstot's presence in Pennsylvania during the time in which it was alleged that he was engaged in the conspiracy (reading).”

28 That was held in Armour's case—I think I have the right to show the nature of the man's presence, why he went there, not for the purpose of making any defense, but to show that he was not there under such circumstances as to make him a fugitive from justice if he left.

The Court: That case never went as far as you claim. That case simply showed the length of time he was within the State, not what he did there, that he simply passed through.

Mr. Patterson: If your Honor please, if you will allow me to refer to another case—I will meet your Honor on that case, first, though. If this were a case where Mr. Ireland had just gone over, if he had gone through in a train, probably then your Honor would have no doubt; if he had gone over a few minutes, as going to Hoboken perhaps, to attend a Directors' meeting, and had come right back, then there probably would be no doubt. I am entitled I think to show that he went to a place far away from the alleged scene of the crime, for temporary purposes, merely to visit friends, and that he was with his friends during that time and returned immediately.

The Court: I will hear the other side.

Mr. Richter: I don't think, your Honor, in the first place, that decisions of a Governor are taken as evidence of the law as is a decision of the Court. There is nothing in the law that I know of that requires the Governor of a State to be a lawyer; and Governor Fort's expressed opinion of what the law was in that case could not have the effect of a judicial decision.

29 There is nothing in the Hoffstot case that affects this case.

This man admits that he went over to New Jersey and stayed there over night. He went there to see some people. That is not going through the State of New Jersey on the way to Chicago or on the way to Pennsylvania or anywhere else; so that the dictum of Judge Holt in the Hoffstot case does not apply to this case. I know all about the Hoffstot case, because Mr. Johnstone and I were interested in it.

The Court: The witness may show the length of time he stopped at this place, but not the purpose.

Mr. Patterson: May I refer to another authority?

The Court: Yes.

Mr. Patterson: If your Honor please, I refer to the case of the People ex rel. Corkran against Hyatt.

Mr. Richter: That was not a conspiracy case.

Mr. Patterson: The defendant was indicted for obtaining money under false pretences. He was allowed to show he had been down in the State of Tennessee,—which was the demanding State; and he was allowed to show why he went there. He went there for the purpose of attending a Directors' meeting, and the Court said: "The question of whether he is a fugitive from justice"—

The Court: If the stay is so short, it may be well to receive evidence of the purpose for which the relator was passing through there or at the place, if it was a short time; but if it was over night that is another proposition.

30 Mr. Patterson: He wasn't there as long as the stay of the relator in the Corkran case.

The Court: I rule that if the stay was very brief, he may show the purpose for which he was there at the place indicated, but not otherwise.

Mr. Patterson: Well, it was not very long, as I have shown.

The Court: If he stayed over night, that was not brief.

Mr. Patterson: He got there at seven and left at six.

Q. What took you down to Seabright on the first occasion you went there, Mr. Ireland?

Mr. Richter: That is objected to.

The Court: I sustain the objection.

Mr. Patterson: I except to the ruling.

The Court: You may note it.

Q. What was your purpose in going to Seabright on this occasion, that is, in July, the 30th of July.

Mr. Richter: Objected to, your Honor, for the same reason as before.

The Court: I sustain the objection.

Q. What had occasioned your going there on the first occasion?

Mr. Richter: Objected to. That is the same question asked in other words.

The Court: I sustain the objection.

Mr. Patterson: Exception.

Q. What occasioned your going to Seabright on the second occasion when you went there?

Mr. Richter: That is objected to.

The Court: The same ruling.

Mr. Patterson: Exception.

31 Q. What was your purpose in going to Seabright on the third occasion that you testified to?

Mr. Richter: Objected to for the same reason.

The Court: The same ruling.

Mr. Patterson: Exception.

Q. What occasioned your going there?

Mr. Richter: That is objected to, your Honor; that is absolutely the same question.

The Court: The same ruling.

Mr. Patterson: I except. May it be noted on the record, your Honor, that my exception covers all this line of questions and rulings?

The Court: It may.

Q. Were you within the State of New Jersey, Mr. Ireland, at any other time during the year 1913, than those to which you testified?

A. No.

The Court: Those dates, will you be kind enough to mention them again.

Mr. Patterson: The 19th of June, 30th of July, and the 1st week in August.

The Court: That is, last year?

Mr. Patterson: 1913—yes, your Honor.

Q. When you went to Seabright in August, Mr. Ireland, what route did you take?

Mr. Richter: I object to that, your Honor; I do not see it is material how he got to Seabright, as long as he got there.

The Court: I will allow that question.

A. Sandy Hook route.

Q. About what time did you go?

A. Late in the afternoon, about a quarter to six.

Q. What time did you get there?

A. About seven o'clock.

- 32 Q. Were you met at the station by anyone?
 A. Yes.
 Q. By whom?
 A. Miss Carpenter.
 Q. Where did you go from the station?
 A. I went to her brother-in-law's house, Mr. Cobb, and dined there.
 Q. Where did you spend the evening?
 A. With the Carpenter's.
 Q. When did you go back to New York?
 A. Early the following morning.
 Q. By what route?
 A. Sandy Hook route.
 Q. What is the time you arrived in New York?
 A. About half-past eight.
 Q. During the year 1913 were you at any time within—at Atlantic City, New Jersey?
 A. Never.
 Q. Or within Atlantic County, New Jersey?
 A. Never.
 Q. Or anywhere within the State of New Jersey except the occasions of which you have testified?
 A. No.

Mr. Richter: Mr. Brown, the assistant prosecutor of Atlantic County, New Jersey, is here, and he would like to cross examine the witness, if he may.

The Court: I would be very glad to have him do so. Welcome to the bar of New York.

Cross-examination.

By Mr. Brown:

Q. Mr. Ireland, did you at any time during the year 1913 have a bank account in a bank in Little Falls, New Jersey?

A. I did——

Mr. Patterson: Objected to as irrelevant, immaterial and incompetent.

The Court: I am inclined to sustain that objection. We have excluded evidence on one side and we must exclude it on the other. You are getting now into other matters.

33 Mr. Brown: This has a bearing on his presence in New Jersey. I only want to know if he had a bank account in the State of New Jersey; and if he did have a bank account it at least raises the inference he was within the State and did business with that bank. That is my purpose in asking that question, not anything else. I only want to know if he had a bank account in New Jersey.

The Court: I will allow that question.

Mr. Patterson: Exception.

Mr. Goldstein: If your Honor will permit me, and also Mr. Patterson will permit me to state and pardon me for interrupting, I

think my client, Mr. Ireland, should be advised not to answer that question on the ground it might incriminate him, and I so advise him.

By the Court:

Q. Have you heard the advice of your counsel?

A. Yes.

Q. You are entitled to that privilege, sir.

A. I decline to answer, sir.

The Court: Strike out the answer already given.

By Mr. Brown:

Q. Do I understand, Mr. Ireland, that you decline to answer any questions of that nature that I may ask?

Mr. Patterson: I object to that question, if your Honor please. The questions can be ruled on as they are asked.

34 The Court: I will allow the question.

Mr. Brown: This is cross examination, your Honor, and it seems to me it is proper.

The Court: I say I have allowed the question. The question is allowed. Objection overruled.

Mr. Patterson: Exception.

A. What is the question?

Q. Do I understand you to decline to answer any question of that kind that I may ask?

A. I don't know what you may ask.

The Court: Of the same tenor—is that what you mean—as the one he declined to answer?

Q. I want to know, Mr. Ireland——

The Court: The witness does not quite understand your question.

Mr. Brown: I will put it in a different way.

The Court: Put it in a way so he will understand you.

Q. Did I understand you refuse to answer any questions that may be asked concerning the subject matter of this account?

Mr. Patterson: I object to that question, if your Honor please. That is a very broad question, Mr. Ireland will refuse to answer any question that he thinks tends to incriminate him.

The Court: Let the witness make no answer to that question.

Mr. Goldstein: May I advise him, your Honor?

The Court: You may advise your client.

35 Mr. Goldstein: Mr. Ireland, you will kindly refuse to answer.

Mr. Richter: I object to that.

Mr. Goldstein: He is entitled to be instructed, the witness, by his own counsel; the Court has so ruled.

The Court: The witness may be advised by his counsel.

Mr. Richter: I know, your Honor, but not told what to answer.

The Court: He may be advised that it is his privilege to decline to answer the question.

Mr. Richter: His counsel is telling him what answer to make, what he should say in answer to the question.

The Court: I do not think there can be much objection to that.

Mr. Richter: It would seem to me, that was hardly the proper thing for counsel to do.

The Court: I know, but he is advising him that he is entitled and has the privilege of declining to answer the question upon the ground that he states.

Mr. Richter: His counsel states that he should answer that question—that he should refuse to answer it.

Mr. Goldstein: I am simply advising my client to answer the question, legally, that he will refuse to answer such questions of the same nature as Mr. Brown has already asked him, as might incriminate him, and that he is advised not to answer.

The Court: Yes; and the client follows the advice of counsel.

Mr. Goldstein: Precisely.

36 The Court: Proceed with the hearing, gentlemen.

Q. Mr. Ireland, I show you here a check, and ask you if that is your check, signed by you (handing paper to witness)?

Mr. Goldstein: That is objected to as incompetent, irrelevant and immaterial, and on the ground it might tend to incriminate him.

The Court: Question allowed. The witness may answer the question.

Mr. Johnstone: The witness having voluntarily become a witness in his own behalf, cannot give part of his testimony and then claim his privilege when he is interrogated in relation to matters which bear on something relevant.

The Court: He has not given any testimony as to the transaction.

Mr. Goldstein: We are not here engaged on the trial of the action.

Mr. Johnstone: We know that. We are engaged in determining here whether acts were committed in the State of New Jersey at or about the time that he admits he was present there—the time, and that has a direct bearing upon the proceeding that is pending before your Honor; and since he has voluntarily tendered himself as a witness, he cannot by virtue of a claim of privilege, decline to answer any question.

The Court: The witness has not given any testimony as to the alleged transaction.

Mr. Johnstone: He has given testimony as to his presence in the State which has a bearing on the subject matter of the inquiry before your Honor. The question now being put to him with respect to these checks has a bearing upon the same matter.

37 The Court: In whatever aspect we can view the question, the witness, at all events, is entitled to claim the privilege that his counsel advises he has.

Mr. Johnstone: I think, your Honor, after a witness voluntarily becomes a witness in his own behalf and gives testimony in relation to the matter, that he is then precluded from claiming the privilege in regard to other relevant matters. Otherwise we will move that the entire direct testimony of the witness be stricken out.

The Court: The Court rules that the witness is advised that he is entitled to claim his privilege and his attention has been called to it rightly by his counsel.

Mr. Johnstone: I move that the direct testimony be stricken out, therefore, upon the ground that the witness now refuses to answer questions pertaining to matters involved in this case.

The Court: Motion denied.

Q. Will you answer the question?

Mr. Goldstein: And I again——

Mr. Brown: May I object at this time to the counsel standing and addressing this witness and telling him what he may or may not do.

The Court: Never mind that. Before we proceed further, put a question.

Mr. Brown: I did ask him a question.

The Court: And he declined to answer upon the ground that he claimed his privilege, that he is entitled to his privilege.

38 Mr. Brown: He has been told that several times by his counsel, and I object to counsel continually arising and interposing his advice to the witness.

The Court: If you will put a question so that we may have something to rule upon. The Court is waiting to rule.

Q. I ask you, Mr. Ireland, if you will answer the question which I asked previous to this one?

Mr. Goldstein: And I advise the witness——

Mr. Johnstone: In view of the fact that you have ruled and he has claimed his privilege, I ask your Honor to instruct the witness in relation to the law upon the subject, once and for all, and not have these constant interruptions of the counsel. The privilege of a witness must be claimed by the witness; it is not the proper place for counsel for the witness to constantly get up and interrupt every question and proceed to put into his mouth the answer that he wants him to give. That is not the proper function of counsel, nor anybody else.

The Court: Wait until the situation arises. It is very difficult to make a hard and fast rule.

Mr. Johnstone: I understand the privilege in such cases, your Honor, can only be claimed by the witness when he wants to invoke it. There is no necessity for two lawyers to get up every time a question is put to him and proceed to give him a lecture about it.

39 Mr. Goldstein: I will adopt Mr. Johnstone's suggestion. If your Honor will permit me to talk to my client for a moment, I will particularly instruct him on the subject.

Mr. Johnstone: Tell him now and see what he says.

Mr. Goldstein: Will your Honor permit me to do so?

The Court: I do.

Mr. Goldstein: Mr. Ireland, you will refuse to answer on the ground of privilege as to the identification of any checks or the giving of any testimony in relation to any matter of checks or your bank account in the State of New Jersey. Please don't forget.

Mr. Brown: Upon what ground?

Mr. Goldstein: On the ground it may incriminate him.

Q. I now ask you, Mr. Ireland, if the check shown to you is your check (paper handed to witness)?

A. I decline to answer on the ground it may tend to incriminate me.

Q. I show you another check made to the order of Charles Stewart in the sum of \$100, on the National Bank of Little Falls, Little Falls, New Jersey, and ask if that is your check (handing paper to witness)?

Mr. Patterson: I object to that as being incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Patterson: Exception.

Q. Will you answer my question?

A. I decline to answer on the ground it might tend to incriminate me.

40 Mr. Brown: Mark these for identification.

The same marked Defendant's Exhibits 1 and 2 for identification.

Q. I now show you, Mr. Ireland, what purports to be a travelers' identification and hotel credit letter issued by the National Protective Hotel Keepers Association in which they authorize their members to cash checks made out to the order of one William Wood, and drawn by one J. D. Ireland, on the Little Falls National Bank, of Little Falls, New Jersey, and ask you if you had that letter issued (handing paper to witness)?

Mr. Patterson: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Patterson: Exception.

A. I decline to answer.

Q. I now show you a similar letter of credit issued by the same association, authorizing their members to cash checks for one Charles Gillispie, drawn by you on the Little Falls National Bank, of Little Falls, New Jersey, and ask you if you had that letter issued (handing paper to witness)?

Mr. Patterson: That is objected to as incompetent, irrelevant and immaterial, and not within the issues raised by the traverse.

The Court: Objection overruled.

Mr. Patterson: Exception.

A. I decline to answer.

Q. I now show you another letter of credit issued by the same institution authorizing their members to cash checks for one Charles Harvey, checks drawn by you on the Little Falls National Bank, of Little Falls, New Jersey, and ask you if that was issued by you (handing paper to witness)?

Mr. Patterson: The same objection.

The Court: The same ruling.

Mr. Patterson: Exception.

A. I decline to answer.

Q. Why do you decline to answer?

A. On the ground it may tend to incriminate me.

Q. I show you what purports to be another letter of credit issued by the same institution, authorizing their members—the same association, rather, authorizing their members to cash checks of one E. A. Leonard, drawn by you on the Little Falls National Bank, of Little Falls, New Jersey, and ask you if that was issued at your instance (handing paper to witness)?

Mr. Patterson: The same objection.

The Court: Objection overruled.

Mr. Patterson: Exception.

A. I decline to answer.

Q. Why?

A. On the ground it may tend to incriminate me.

Q. Mr. Ireland, how many times have you been in Atlantic City?

A. Once.

Q. And that was when?

A. In the Spring of 1911.

Q. During the year 1913 how many times were you in the State of New Jersey?

A. Three times.

Q. Those are the three times to which you have already testified?

A. They are.

Q. And where?

A. Seabright, New Jersey.

42 ADELE CARPENTER, a witness called and sworn on behalf of the relator, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Miss Carpenter, where do you reside?

A. New York City.

By the Court:

Q. New York City, Madam, is a big place, running from Tottenville, Staten Island, up to Yonkers City line?

A. Borough of Manhattan.

Q. That is a big place also; please tell us where in the Borough of Manhattan?

A. I live on West End Avenue.

Q. That is a long avenue; what is the number?

A. 526.

By Mr. Patterson:

Q. You live there with your parents?

A. Yes.

Q. Are you acquainted with Mr. John D. Ireland, the relator in this proceeding?

A. I am.

Q. Did you see him about the 1st of January, 1913?

A. I did; I spent the afternoon with him.

Mr. Richter: Speak louder, please.

A. (Continuing.) I spent the afternoon with him.

Q. On January 1st, 1913?

A. Yes.

Q. Whereabouts, Miss Carpenter?

A. I took luncheon at the Astor with him.

By the Court:

Q. Hotel Astor, Madam?

A. Yes.

By Mr. Patterson:

Q. In New York City?

A. Yes.

Q. And then what did you do?

A. We went to the theatre.

Q. In New York City?

A. In New York.

43 Q. And after the theatre, what did you do?

A. Took tea.

Q. Still in New York City?

A. In New York.

Q. And after that, what did you do?

A. I went home.

Q. With Mr. Ireland?

A. Mr. Ireland took me home.

Q. About what time did you get home?

A. About seven o'clock.

Q. Did you see Mr. Ireland at any time during the month of June, 1913?

A. I saw him on the 12th and 13th in New York City.

Q. At about what time of day?

A. I lunched with him on the 12th—I dined with him on the 12th with my brother-in-law and sister.

Q. And Mr. Ireland?

A. And Mr. Ireland.

Q. And you saw him on the 13th, you say?

A. Yes, on the 13th I had lunch with him.

Q. In the City of New York?

A. Yes.

Q. Did you see him again during the month of June?

A. I saw him on the 19th.

Q. Whereabouts?

A. At Seabright.

Q. When did you first see him in Seabright?

A. I met him at the train.

Q. At about what time?

A. About 6:30.

Q. And what train was that?

A. The boat train from New York.

Q. And after leaving the station, what did you do?

A. We went and dined with my parents.

Mr. Richter: That is objected to.

The Court: I sustain the objection.

Mr. Patterson: Exception.

Q. Did you see him during the evening of the 19th?

A. The whole evening.

The Court: The 19th of what?

Mr. Patterson: Of June.

44 Q. Until when?

A. About 10:30.

Q. Then he retired?

A. Yes.

Q. Did you see him the next day?

A. No, I did not.

Q. Did you see him at any time during the month of July?

A. I saw him on the 1st of July.

Q. Whereabouts?

A. In New York City.

Q. At what time?

A. In the afternoon.

Q. Was that the only time you saw him on the—what date was that?

A. The 1st of July.

Q. The 1st of July?

A. Yes.

Q. Was that the only time you saw him on the 1st of July?

A. Yes, sir.

Q. In the afternoon?

A. In the afternoon.

Q. In New York City?

A. In New York City.

Q. Did you see him again during the month of July?

A. I saw him on the 16th and 17th.

Q. Whereabouts?

A. In New York.

Q. At what time of the day?

A. I lunched with him on the 16th and dined at the Knickerbocker.

Q. What about the 17th?

A. On the 17th I saw him in the morning.

Q. Did you see him again in New York during—did you see him again anywhere during the month of July?

A. I saw him in Seabright on the 30th and in New York on the 28th.

Q. What time did you see him on the 28th?

A. I saw him on the 28th in the afternoon in New York City.

Q. And when did you see him at Seabright on the 30th?

A. I called for him at the train and he dined with friends of mine.

Q. And did you see him during that evening?

A. The whole evening.

Q. Did you see him the next day?

A. I did not.

Q. Did you see Mr. Ireland at any time during August?

45 A. I saw him the first week in August, but I don't remember the date.

Q. Whereabouts?

A. Down at Seabright.

By Mr. Johnstone:

Q. What date is that?

A. I don't remember the date.

By Mr. Patterson:

Q. When did you say you first saw him on this occasion?

A. I called for him at the station.

Q. Then what did you do?

A. Dined with my sister and her husband.

Q. What time did you meet him at the station?

A. About 6:30.

Q. Did you see him during the evening?

A. The whole evening.

Q. Did you see him the next day?

A. I did not.

Q. Did you see him at any other time in New York except these occasions to which you have referred?

A. No, sir, I did not.

Q. On these occasions did he go to Seabright in response to an invitation from your family?

A. Yes, every time.

Mr. Johnstone: What is that?

A. (Continuing:) Each time he was invited.

Q. By your family?

A. Yes.

Cross-examination.

By Mr. Johnstone:

Q. Do you keep a diary?

A. No, I never have.

Q. You have a pretty good memory for dates, haven't you?

A. Yes, rather good.

Q. What days did you see him during the year 1913 in the City of New York?

A. I do not know; I have no idea.

Q. You just told us a moment ago; give them over again; 46 give me the dates one by one, on which you saw Mr. Ireland in the City of New York, during the year 1913?

A. Well, in reference to this case I saw him on the 1st of January—

Q. Never mind this case; you say you saw him on the 1st of January?

A. When I told you, one of the dates—every day that I saw him.

Q. Give me them now, if you will, the dates upon which you saw Mr. Ireland in the City of New York, during the year 1913?

A. I can give you no dates, but the dates I have given you.

The Court: What dates are those.

Q. What are those?

A. First of January, and the 12 and 13th of June, the 1st of July, and the 16th and 17th of July, and the 28th.

Q. You left one of them out that time, didn't you?

A. Did I?

Q. July 16th?

A. I said the 16th and the 17th of July.

Q. So that you recall distinctly at the present moment that upon these dates: January 1st, June 12th, June 13th, June 19th, July 1st, July 15th, July 17th, July 28th, and July 30th, and some dates in the early—first week in August, that upon each one of these dates you saw Mr. Ireland; is that true?

A. Yes, sir.

Q. And you recall each one of those dates distinctly?

A. Yes, sir, distinctly.

Q. You don't remember any other dates?

A. No; I have tried to find out about these dates.

Q. Where did you go to get information about them?

A. I went to my doctor for one date, because I came in town to see the doctor.

Q. Where did you go, Miss Carpenter, to get the information about dates?

A. I just said I went to my doctor for one date.

47 Q. Which date is that?

A. That is the 12th of June.

Q. The 12th of June you went to whom?

A. My doctor.

Q. Your doctor?

A. Yes.

Q. What is his name?

A. Dr. Taylor.

Q. On the date of the 13th, where did you go to get the information about that?

A. I spent the night in town and saw him next day with my sister in town.

Q. You lived in New York, didn't you?

A. I lived in New York, but I was staying at Seabright at that time.

Q. Where were you on the 1st of January, in New York?

A. I was in New York.

Q. How do you fix the date of the 19th of June?

A. The 19th of June?

Q. Yes.

A. That is the date he came down in response to an invitation.

Q. You say you went in to New York?

A. I did not, I said I was down at Seabright.

Q. How do you fix the date, the 19th of June?

A. Because I invited him down there.

Q. I know, but how do you fix the date?

A. I think you generally remember when you invite people down.

Q. I don't think so; I think it requires an extraordinary memory to remember those things; I do not remember them.

A. If you only invited a person three times, you generally remember the dates.

Q. It is only a coincidence that those dates you so vividly recall correspond to the dates that are mentioned in this indictment?

A. It is not a coincidence at all, it is a fact.

Q. It is not a coincidence also?

A. That may be; I don't know anything about that.

48 Q. Give us—are those all the dates that you saw him on in 1913?

A. Why, no, not at all.

Q. How many times did you see him during that year?

A. I have no idea how many times.

Q. Well, about how many?

A. Am I to answer that, your Honor?

The Court: Yes.

Q. I should think that since you so clearly remember these one, two, three, four, five, six, seven, eight, nine specific dates, you ought to be able to give us some idea about the number of times?

A. I saw him nearly every day.

Q. Every day?

A. Nearly every day.

Q. You saw him nearly every day instead of only on those nine dates?

A. I saw him on those nine dates too.

Q. You saw him every day?

A. When I was in town, nearly every day.

Q. Nearly every day?

A. Nearly every day.

Q. Nearly every day. Do you recall that in addition to these nine days you saw him every day in New York?

A. Nearly every day.

Q. How many days in that year did you not see him in New York?

A. I have no idea.

Q. Well, give us some idea?

A. I have none.

Q. I want the best of your recollection?

A. I have no recollection on the subject.

Q. Was there any time you didn't see him, we will say, for a month at a time?

A. No.

Q. A week?

A. Yes, when I was out of town.

Q. And how long were you out of town?

A. I was out of town four months in the Summer.

Q. Four months out of town?

A. Yes.

Q. So that during these four months you didn't see him in New York?

A. I was in during the month of June, and I came in not after that until September.

49 Q. Did you invite him down to Seabright?

A. I did.

Q. Wrote him a letter?

A. I don't remember; I think I talked to him over the telephone.

Q. Telephoned to him?

A. Yes.

Q. Did you take and make any memorandum of the date?

A. No.

Q. Give me the dates that he was in Seabright during the year 1913?

A. I have given them to you.

Q. Give them to me again if you will?

A. He was there the 19th of June, the 30th of July, and the first week in August.

Q. Have you ever been in Atlantic City?

A. I was there years ago.

Q. Were you there in 1913?

A. I was not; I have not been there since I think 1906.

CECILIA H. LAWSON, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Miss Lawson, where do you live?

A. New York City.

Q. Whereabouts in New York City?

A. 810 West End Avenue.

Q. Do you know Mr. John D. Ireland, the relator in this proceeding?

A. Yes.

Q. Did you see him at any time during the months of June and July, 1913?

A. Yes, sir; I did.

Q. Did you make any note of the times you saw him?

A. Yes; I have it in my daybook.

Q. You kept a memorandum of your appointments?

A. Yes, sir.

Q. And how you occupied every day?

A. Yes, sir; every day.

50 Q. Did you make that memorandum at the time?

A. At the time, yes.

Q. Will you please look at your memorandum——

Mr. Johnstone: Let us see if she can testify from her memory without the memorandum first. Let him exhaust her present recollection.

Q. Do you recollect any dates in the month of June when you saw Mr. Ireland?

A. I remember the 14th of June because that is the day of the polo match; I was up at Biddeford Pool and we telephoned down to find out about the game.

Q. Do you remember any other dates in June that you saw him?

By Mr. Johnstone:

Q. What was that date?

A. June 14th.

By the Court:

Q. Are you in any business, madam?

A. No.

By Mr. Patterson:

Q. Do you remember any other dates during June when you saw him?

A. Yes—No, I can't remember any dates.

Q. Can you by looking at your memorandum state any other dates in June when you saw him?

A. Yes, I can.

Q. Will you please do so?

Mr. Johnstone: May we examine the memorandum and see if we need to cross examine on it?

The Court: Yes.

Mr. Johnstone: I don't want to look through the whole thing; I don't want to examine the whole document.

Mr. Patterson: Let Miss Lawson first have a look and tell us the date, then.

51 Mr. Johnstone: I thought you were directing her attention to the date.

Q. I ask her then to examine her book and tell us what dates?

A. Beginning the 1st of June or May, or when, any time?

Q. Beginning early in June, not earlier than the first day of June?

A. Met Mr. Ireland the 1st day of June, Sunday.

Q. At what time?

Mr. Johnstone: Let me look at the memorandum for that day, please (same handed to counsel).

By Mr. Johnstone:

Q. When did you write this, this is your handwriting?

A. That was written the day, part of it, and the other, some of it the day before; things that were engagements were written the day before and current events the day after.

Q. This is your own handwriting?

A. Yes, that is my handwriting.

Q. Well, it was made--this represents the 1st of June?

A. Sunday the 1st of June.

Q. Was that made, all of it, the 1st of June, or *on* the 1st of June? Look at it (handing same to witness.)

A. The first part of it was written before the first of June, where it says, "Tea at home;" and afterwards "Mr. Ireland stayed to supper," which was something that happened unexpectedly, and I put that in afterwards.

Q. It appears as what, just read what it says?

A. "Jack to supper."

Q. "Jack" refers to Mr. Ireland?

A. To Mr. Ireland.

Q. Do you know anybody else named "Jack"? Could it by any possibility mean that there was any other "Jack"?

A. No.

52 By Mr. Patterson:

Q. Where did you see Mr. Ireland on this day, Miss Lawson?

A. Where did I see Mr. Ireland?

Q. Yes?

A. In my own home; stayed there at supper.

Q. In New York City?

A. Yes.

Q. At what time?

A. About seven o'clock. Mr. Ireland came to tea and stayed to supper.

Q. When did you next see Mr. Ireland?

A. I think it was the night of the 4th of June, that I left for Maine.

Q. Look at your notes and see if you can refresh your memory as to any other dates?

A. It was Wednesday, the 4th of June.

Q. Where did you see him then?

A. I went down to take the train to Boston, and Biddeford and Mr. Ireland came down to see me off and almost missed the train. He took the train up to 125th Street with me.

Q. At what time was this?

A. The train that leaves here at 8:30.

Q. Leaves Grand Central?

A. Leaves Grand Central at 8:30 for Maine.

Q. When was the next time you saw Mr. Ireland in the month of June?

A. That is the date I spoke of, the 14th of June.

Q. Where did you see him then?

A. On the morning of the 14th I met Mr. Ireland in Boston.

Q. Then what did you do?

A. We went on to Biddeford Pool.

Q. How long was he in Biddeford Pool; look at your notes if you don't recollect, Miss Lawson?

A. Mr. Ireland left on a Sunday night, the 15th.

Q. Now do you remember any time when you saw him during the month of July?

A. Yes, sir, I did on the 3rd of July.

Q. Where did you see him then?

A. I saw him in Boston.

53 Q. And how long was he in Boston?

A. He was in Boston about two hours and then we took a train, he and my sister, and went up to Biddeford.

Q. How long was he at Biddeford?

A. He was there the 3d, the day of the 4th, and left in the morning of the 6th.

Q. The Biddeford you are referring to is in Maine?

A. Biddeford Pool, Maine.

Q. Did you see him again during the month of July?

A. Not until I came back in the month of July, the 22nd, I think.

Q. Look at your memorandum and refresh your recollection, Miss Lawson?

A. I think I saw Mr. Ireland on the night of Wednesday, the 23rd of July.

Q. I beg your pardon?

A. I think I saw Mr. Ireland on the night of Wednesday the 23rd of July.

By Mr. Johnstone:

Q. Are you sure?

A. Yes, I am pretty sure.

Q. Have you got a memorandum of that?

A. No; I have not a memorandum of that; I came back, I have a memorandum of the date I came home, and that evening I remember he did come up there and saw me that evening.

By Mr. Patterson:

Q. Where did you see him on this occasion?

A. I saw him in New York City.

Q. Did you see him again during the month of July?

A. I saw him Thursday, the 24th of July.

Q. Where?

A. Had tea with him.

Q. Whereabouts?

A. Had tea at the Ritz Carlton in the afternoon.

Q. In New York City?

A. In New York City.

Q. Did you see him again?

A. Yes, I spoke to him over the telephone Friday; I saw him Saturday, the 26th, and took luncheon with him at 12:30.

Q. Did you see him after the 26th?

54 A. Yes, I saw him several times after the 26th. I saw him Tuesday, the 29th of July, in the evening.

Q. Whereabouts?

A. Mr. Ireland and my sister and I went to the Winter Garden.

Q. In New York City?

A. New York City.

Q. You said something as to the 26th, Miss Lawson, I didn't quite catch it?

A. The 26th?

Q. Yes.

A. I had lunch with Mr. Ireland at the Ritz Carlton Hotel, Saturday, July 26th.

Q. In the City of New York?

A. In the City of New York.

Cross-examination.

By Mr. Johnstone:

Q. What date was that?

A. Saturday, July 26th.

Q. Let me look at that book, will you please, Miss Lawson. I am not going to go through the book: I am just going to take one or two of these dates (book handed to counsel). Did I understand that one of the dates you saw him was the 14th of June?

A. The 14th of June, yes.

Q. How do you fix it?

A. The fact it was the polo day, that is the reason I remember it.

Q. What is that?

A. The day we had the second polo game; and I telephoned from Biddeford, Maine, we telephoned down to find out the score of the polo game.

Q. Where did you see him on the 14th of June?

A. I saw him first in Boston; he came down with me to Biddeford Pool, Maine, from Boston.

Q. You were in Boston on June 13th, were you?

A. No, I went into Boston the morning of June 14th.

Q. The morning of the 14th?

A. Yes.

Q. And then you went from there to Biddeford, Maine?

A. Yes, sir; Biddeford Pool, Maine.

Q. You saw him there?

55 A. I met Mr. Ireland in Boston; he went down with me to Biddeford Pool.

Q. You haven't any entry of that here?

A. No, but I remember by the big polo game, I know that that is the date of the polo game.

Q. Where was the polo game?

A. It was at Westbury, Long Island.

Q. You were up at Biddeford, Maine?

A. I was; I said that I telephoned down to find out the score.

Q. July 30th, did you see him on that day?

A. July 30th? I don't think so.

Q. You don't mind my looking here?

A. No, I do not.

Q. Some of these memorandums, I note, are made in pencil; when were they made?

A. Some made at the time of the engagement; some with pencil and some in ink.

Q. Was that an engagement or the record of an event (indicating)?

A. That is an engagement.

Q. That was put in beforehand?

A. Yes.

Q. Now, on the 2nd of June, you had an engagement with him, too?

A. The 2nd of June?

Q. You didn't say anything about that. Does that represent that (handing book to witness)?

A. I spoke of that, didn't I, as I went in and saw Mr. Ireland and my sister.

Q. I thought you said June 4th was the next date?

A. That was an engagement; yes.

Further hearing in this matter adjourned to July 8th, at 10:30

A. M.

New York,

July 8th, 1914.

Trial Resumed.

HENRY GOLDSTEIN, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Mr. Johnstone: I want to have the relator recalled, if I may, for further cross examination.

Mr. Patterson: If your Honor please I would ask your Honor to rule in case the relator is recalled, that he is made the witness of the party who calls him, because his cross examination was finished yesterday.

Mr. Johnstone: That is not so; I had not finished cross examination.

The Court: That is a matter resting in the discretion of the Court: I will allow it.

Q. Mr. Goldstein, where do you live?

A. I live at Arverne, Long Island.

Q. Are you an attorney at law?

A. I am.

Q. You are the attorney for John D. Ireland, the relator, in this proceeding?

A. I am.

Q. Did you see John D. Ireland during the months of June and July, 1913?

A. I did.

Q. Can you recollect when you saw him?

A. I can't without refreshing my memory from memoranda in my diary and my ledger.

Q. Did you make memoranda in your diary and ledger with reference to interviews with Mr. Ireland at the time they occurred?

A. Yes.

Q. Will you please, by referring to the documents you mentioned, state when and where during those months you saw Mr. Ireland?

A. During June and July, 1913, Mr. Patterson?

57 Q. June and July, 1913, please?

A. (Examining books:) I saw Mr. Ireland on the 2nd and 3rd of June; on the 5th of June; on the 6th of June; on the 9th, 10th, possibly the 12th, which I am not certain of.

Mr. Johnstone: Have you any note of the 12th, have you any memorandum of the 12th?

The Witness: I have not.

A. (Continuing:) I have a memorandum from which I am absolutely certain I had a case of his on that day. I know that I spoke

to him every day during the last possibly thirteen years, with the exception of Sundays and holidays, and then on those days over the telephone, possibly. There was hardly a day I didn't speak to him, except when he was out of town, and often times then over the long distance telephone, in regard, of course, to his matters. I possibly saw him on the 12th of June, on the 13th—possibly on the 18th.

Mr. Johnstone: Never minde the possibly's.

A. (Continuing:) I say I did see him on the 18th of June, the 19th, the 23rd, the 24th, and the 25th; on July 2nd, July 8th, July 10th, July 11th, July 12th, July 14th, July 15th, July 16th, July 17th, July 23rd, July 24th, July 26th, July 30th and July 31st.

Q. Where did you see him on those occasions, Mr. Goldstein?

A. New York City.

Q. What part of New York City?

A. At my office, and once or twice at the Western Union Telegraph Building, corner of Dey and Broadway.

Q. In the Borough of Manhattan, City of New York?

A. Borough of Manhattan, City of New York.

58 Cross-examination.

By Mr. Johnstone:

Q. Have you ever been in New Jersey?

A. I have, sir.

Q. How far is the State of New Jersey from the Borough of Manhattan?

A. How far?

Q. Yes.

A. I have been to Atlantic City——

Q. I didn't ask you about Atlantic City, I asked you about the State of New Jersey?

A. I have been going there frequently into the State of New Jersey.

Q. I asked how far, what is the distance of the State of New Jersey from the Borough of Manhattan?

A. Why, across the river, I should judge about a mile and a half or two miles.

Q. You could get there in about fifteen minutes, couldn't you?

A. Why, certainly, less than fifteen minutes.

Q. Now, let me see your diary for the 9th of June?

A. (Witness hands same to counsel.)

Q. What time of the day did you see him on that day?

A. I can't specify the exact hour on that day, but it was usually in the afternoon.

Q. Now, wait. Don't tell me about what was usual, Mr. Goldstein. If you don't know, say so.

A. I can't specify the hour, Mr. Johnstone, but I know what the custom was.

Q. You are a lawyer; now, don't Mr. Goldstein. I don't want you to tell me anything I don't want to know. How long did you see him on that day?

A I cannot say this moment; it may have been five minutes.

Q. You have no recollection?

A. No, I can't specify the number of minutes I spoke with him.

Q. You didn't have him with you all day long?

A. Certainly not.

Q. You possibly saw him for maybe half an hour?

59 A. Possibly five minutes, possibly more than that, possibly I walked over with him to the subway station.

Q. That is a casual interview?

A. Casual, but on his business of course.

Q. Now, will you kindly go to the 14th of July?

A. July 14th?

Q. Yes.

A. Yes, I have it.

Q. Let me look at it, will you?

A. (Hands same to counsel.)

Q. There is nothing in this memorandum that indicates at what time of day you saw him on that day?

A. I refresh my recollection that I saw him on that day from certain entries made here which I know I spoke to him about on that day, and certain matters referring to his sister.

Q. I take it that the entry that you refer to regarding the relator is "See J. D. about Beatty—Sicard matter." That refreshes your recollection that it was about him on that day, that is what recalls it to your mind that you saw him or that you were to see him?

A. That memorandum was that I should see him on that day, but not that I did see him.

Q. This memorandum was made in advance of the actual event?

A. Correct.

Q. And was meant to be that you had an appointment with him on that day?

A. It didn't mean that, but it meant that I should see him.

Q. It meant you wanted to see him on that particular day?

A. Yes.

Q. In the course of your practice you happened to have a little open time on that day and it would be convenient to see him?

A. Not necessarily, Mr. Johnstone; I meant when I spoke to him particularly to call his attention, see him with respect to that matter, on that particular subject. It was not an appointment.

60 Q. Sometime before the 14th of July you expressed a desire to see him upon that day?

A. Possibly the day before or possibly the morning of that day.

Q. And you made a memorandum that way, and also to note that you had an appointment to see him on that day?

A. As I say, it was not an appointment, it was simply something to refresh my memory that I was to speak to him about.

Q. The same thing as an appointment?

A. Possibly the same thing as an appointment.

Q. What I meant under that was that you did not record as an event that took place on that date, you meant the entry as a reminder to do something on that date?

A. That is correct.

Q. You made the entry sometime prior to the coming of that day?

A. Yes.

Q. So that there is nothing in that entry that shows positively that you did actually see him upon that day?

A. No, excepting that I know I saw him every day almost.

Q. Then you are simply guessing at the fact that you did see him?

A. I am not guessing, Mr. Johnstone. I have seen Mr. Ireland most every day in the last thirteen years, except on Sundays and holidays and when he was out of town and when I was out of town.

Q. What time of day did you see him on the 14th of July?

A. I can't specify the hour, but I will say it was in the afternoon.

Q. Don't "say" anything. How long was he with you?

A. I cannot say.

Q. Was it more than half an hour?

A. I cannot say.

Q. You won't swear that it was?

A. Certainly not.

Q. Now, will you turn to the 19th of June?

A. Yes.

61 Q. What day of the week was that?

A. That was on a Thursday.

Q. What time did you see him on that day?

A. I cannot say positively. I am almost sure I did see him that day in reference to an important matter, in fact, two matters.

Q. Well, let me look at that book (book handed counsel). There is no entry on the 19th of June respecting Mr. Ireland, is there?

A. No, sir, but—

Q. Now, wait, won't you, Mr. Goldstein, don't, please don't?

A. No, but there is respecting his matters.

Q. I put a simple question to you. Is there any other entry in this diary under date of the 19th of June, 1913, referring to Mr. Ireland?

A. You mean to him personally?

Q. Yes.

A. You mean his name?

Q. Yes.

A. His name is not there, no.

Q. Is there anything referring to him by name or otherwise?

A. Yes, there is.

Q. What is it?

A. The name of Brilles and Laflin against the Greenwich Cold Storage Company.

Q. Who is Brilles?

A. Mr. Brilles is Mr. Brilles of House, Grossman & Vorhaus.

Mr. Johnstone: I ask your Honor to look at that entry in the diary there (handing same to Court).

Q. Nothing there about Mr. Ireland?

A. His name does not appear there, I say that.

Q. After having inspected that entry again, do you still say positively that you saw Mr. Ireland in New York?

A. I cannot say positively that I saw him, but by reason of a reasonable certainty in my mind, by reason of the entry in my diary, yes.

Q. Do you or do you not say that you saw him on that day to the best of your recollection?

A. Why, yes, I saw him.

Q. Where did you see him?

A. At my office.

Q. What time?

A. I don't know the hour.

Q. Anybody with him?

A. No.

Q. He came there alone?

A. Always alone.

Q. What did Brilles have to do with it?

A. Mr. Brilles was interested in the matter, he had an architect there, an alteration made in reference to an engine to be changed in the Greenwich Cold Storage plant. Mr. Ireland was interested in that plant, and I was to see Mr. Brilles in reference to the engines that were then used there or to the changing of the engine or restoring it, I don't remember which, and I was to see Mr. Brilles and I always spoke with Mr. Ireland as to what line or lines of conversation I was to engage in or the matters that I had to go into, and the name of Brilles brought the whole matter to mind.

Q. You say now from the mere fact that you see the name of Brilles in your diary upon that date that therefore you saw Mr. Ireland as a matter of fact?

A. Yes.

Q. On that same day?

A. Yes.

Q. Could not you have seen him the day before?

A. Indeed, I saw him the day before, indeed I saw him most every day, but I wanted to see him again about that.

Q. Couldn't you have spoken to him the day before and had that entry put in there?

A. There was another entry the day before.

Q. You could have spoken to him on the day before about the engine?

A. Possibly I did.

Q. What time did you leave your office the 19th, that was the day he was there, you say?

A. I cannot specify the hour, except generally, Mr. Johnstone.

Q. He was in New Jersey on the 19th, wasn't he?

A. I don't know.

Q. You heard him say on the witness stand that he was?

A. I couldn't tell you what may be in the evidence, but I know I spoke to him on the 19th day of June.

Q. Didn't you hear him testify in Court yesterday that on the 19th of June he was in Seabright, New Jersey?

A. He may have been at night.

Q. Now, Mr. Goldstein, during the year 1913, beginning January 1st, I suppose there were very many days upon which Mr. Ireland may have been in the State of New Jersey without you knowing it?

A. Positively, Mr. Johnstone.

Q. You were not his keeper?

A. I was not his guardian or his keeper.

Q. And you were not with him all day long?

A. Certainly not.

Q. And New Jersey is contiguous to New York?

A. Yes, sir, certainly.

Q. And he could have gone over there and come back in a half a day?

A. Yes, you can go over there in ten minutes.

Q. Any part of the State?

A. Why, certainly.

Q. Now, turn to July 30th, will you?

A. Yes.

Q. Let me look at the entry on that date?

A. (Handing paper to counsel.) I will give you the ledger for that date, Mr. Johnstone, from which I refreshed my memory; there is nothing in the diary on that date at all. If you will look on July 30th here (indicating in another book) right there.

Q. Now, on July 30th, 1913, in your ledger appears the following entry: "Consulting J. D. I. Phoned Atlantic Swing-
61 hammer." What does "Phoned Atlantic" mean?

A. It means I telephoned to Atlantic City to Mr. Swinghammer.

Q. In reference to J. D. Ireland?

A. Yes, sir.

Q. So that on the 30th of July, 1913, you had a conversation with a gentleman in Atlantic City in reference to Ireland?

A. I did.

Q. Who was Swinghammer?

A. Mr. Swinghammer was the attorney in Atlantic City for Mr. Stewart.

Q. And Stewart is one of the men who is named as a co-conspirator in this indictment, isn't he?

A. If it is so mentioned in the indictment, I presume so.

Q. Haven't you seen the indictment?

A. I take it for granted that is so.

Q. You have seen the indictment?

A. I have glanced at it, I have not read it through, Mr. Johnstone.

Q. I mean, you saw the name Stewart there?

A. Yes, Stewart's name is there.

Q. The same Stewart?

A. The same Stewart, the same man.

Q. You telephoned to Atlantic City?

A. I certainly did, several times.

Q. Was Mr. Ireland at your office at the time you telephoned?

A. That I can't say; I don't know.

Q. You say there "Consult J. D. I."

A. Yes, sir.

Q. Did you consult him?

A. I certainly did see him on that day and consulted him.

Q. With reference to Swinghammer and telephoned—

Mr. Patterson: I object to that.

A. I must claim privilege.

Mr. Johnstone: You have no privilege.

The Court: He is an attorney; he cannot divulge his client's matters.

65 Mr. Johnstone: I am not asking him to tell what he told him. He says himself, your Honor, he consulted him about Swinghammer. I am asking him just for the fact as to whether he consulted Mr. Ireland in reference to this matter that he has testified to.

Mr. Patterson: He is asking now for the substance of a consultation. I object to it upon the ground it is privileged.

The Court: I sustain the objection.

Q. Did you consult Mr. Ireland upon that occasion in reference to Swinghammer?

A. I claim the privilege and the right not to answer that question.

Mr. Patterson: I object to it, your Honor.

The Court: I sustain the objection.

A. (Continuing:) I claim privilege as to the latter part of the question, your Honor.

Q. I suppose you also heard Mr. Ireland testify that he was in Seabright on the 19th of June?

A. If that is so, and you tell me it is correct, I will take it for granted.

Q. And on the 30th of July?

A. I know he testified he was at Seabright in the State of New Jersey on certain dates; what days those are, I don't remember.

Q. Mr. Ireland has been a client of yours for a good many years?

A. Between 13 and 14 years—I will say 13.

Q. You have seen him write?

A. Yes.

Q. Are you familiar with his handwriting?

A. Yes.

Q. Is that his handwriting (handing paper to witness)?

66 Mr. Patterson: I object to the question, if your Honor please, as immaterial, incompetent, and irrelevant.

The Court: Objection overruled.

Mr. Patterson: Exception.

A. I claim, if your Honor please, a privilege.

Q. There is no privilege there?

A. Counsel is endeavoring now to get me to identify what Mr. Ireland, my client, has claimed privilege on.

Q. Why Mr. Ireland's situation was different?

A. I claim the same privilege extended to him, should be extended to his attorney in reference to the matter in which he claimed privilege.

Q. The privilege he claimed was the privilege of any witness as to self incrimination. Do you wish to claim that privilege?

A. I have nothing to claim as to self incrimination, but I claim, Mr. Johnstone—

Mr. Johnstone: Mr. Goldstein, wait a moment, will you please?

The Court: Proceed.

Q. Do you make any claim here of invoking the constitutional privilege against self incrimination?

A. Certainly not.

Q. Now, this paper that I offer you was not any communication that Mr. Ireland made to you in the course of your professional capacity, was it?

A. No.

Mr. Johnstone: Then I submit, your Honor, there is no privilege of any kind here, and ask that he be directed to answer.

The Court: I will hear counsel.

Mr. Patterson: If your Honor please, the knowledge of the writing may have been gained in the course of professional employment, communications in writing, etc.

67 The Court: If the witness will so state, then—

Mr. Patterson: May I ask him.

The Court: You may.

By Mr. Patterson:

Q. How did you acquire your knowledge as to Mr. Ireland's handwriting?

A. By his being my client and having communicated with him continually; and receiving letters from him, etc., checks and other papers.

Mr. Patterson: I renew the objection on the ground of privilege, and call your Honor's attention again to the professional capacity of the witness.

Mr. Johnstone: I submit, your Honor, that the objection is ridiculous. The question which I put to him has nothing whatever to do with any communication made to him as a lawyer. I am merely asking for a fact. I have already asked him if he is familiar with Mr. Ireland's handwriting. He said yes. I ask if that is his handwriting.

Mr. Patterson: Your Honor, if I may be allowed to ask how he obtained the information.

Mr. Johnstone: He does not say how he obtained the information.

The Court: It does not call for the disclosure of any confidential communication.

Mr. Patterson: It depends upon information which has been gained by the witness in the course of professional employment.

That is, the writing to and receiving from his client of letters.

68 The Court: I think that would be extending the rule far beyond its natural intent to fix any such limitation.

The Witness: May I ask your Honor a question?

The Court: You may.

The Witness: As Mr. Ireland's attorney, does not the privilege which Mr. Ireland has claimed here also extend to me being as I am his attorney?

Mr. Johnstone: He is not claiming any privilege on that ground?

The Witness: As to this particular thing.

Mr. Johnstone: He claimed it on the ground of self incrimination.

The Witness: For the same reason I claim, as his attorney in this particular proceeding, and as his attorney during the course of the last few years, that I am entitled to the same privilege for his benefit only.

Mr. Johnstone: I ask your Honor to direct him to answer the question.

The Court: I overrule the objection.

Mr. Patterson: Exception.

A. To the best of my recollection that is Mr. Ireland's handwriting.

Mr. Johnstone: That is the paper, your Honor, that was marked Defendant's Exhibit 1 for identification. I think it ought to be People's Exhibit 1 or Respondent's Exhibit 1—I will ask to have it changed to Respondent's Exhibit 1—well, we are the defendant, I suppose; let it go at that.

Mr. Patterson: I suppose you are.

69 Mr. Johnstone: Defendant's Exhibit 1 for identification is a check drawn on the bank of Little Falls and I offer it in evidence.

Mr. Patterson: I object to this, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial. It does not show that it is anything more than a piece of paper that has never been used in any way.

The Court: For what purpose is this paper offered?

Mr. Johnstone: Here is a paper drawn, your Honor—the witness testified it is in the relator's handwriting. This paper is dated at Little Falls, New Jersey—

The Court: I say, what is the purpose of it?

Mr. Johnstone: The purpose—circumstantial evidence showing his presence in the State of New Jersey at that time.

Mr. Patterson: I object to it, if your Honor please.

Mr. Johnstone: I will submit it to your Honor, and I submit it is relevant.

The Court: For the purpose stated the evidence is relevant and I overrule the objection.

Mr. Patterson: If your Honor please, there is no proof that it ever was negotiated or that it ever passed out of the State of New York.

The Court: The Court has announced its ruling. You may make a note of your exception.

Mr. Patterson: Exception.

The same received in evidence as Defendant's Exhibit 1.

70 I show you another paper marked Defendant's Exhibit 2 for identification, and I ask you whether or not that is in the defendant's handwriting.

Mr. Patterson: I make the same objection, if your Honor please.

The Court: I make the same ruling.

Mr. Patterson: Exception.

A. I claim the same question of privilege.

The Court: The same ruling and exception.

A. (continuing.) To the best of my knowledge it is Mr. Ireland's handwriting, that is, the signature of it.

Q. The signature and the body of it?

A. The body I don't know.

Q. The signature is?

A. The signature is.

Mr. Johnstone: I offer it in evidence, your Honor.

Mr. Patterson: I make the same objection as before to the last exhibit.

The Court: The same ruling.

Mr. Patterson: Exception.

Mr. Johnstone: I would ask your Honor to take judicial notice of the fact that these papers or checks are those that are mentioned in the indictment.

Mr. Patterson: I beg your pardon; that is incorrect.

Mr. Johnstone: Isn't the indictment here?

The Court: What does the indictment say, do you want to go into that?

Mr. Patterson: There is nothing about any check of this date. Your Honor will see by comparing dates in the indictment that is not the check.

The Court: That is not the check?

Mr. Patterson: No, sir.

The Court: If that is not the check, then, I sustain the objection to its admissibility. *

71 Mr. Johnstone: That won't affect the objection that I offer to your Honor's ruling as this is circumstantial evidence tending to show his presence in New Jersey about that time.

Mr. Patterson: But on another day.

The Court: How near are they to each other?

Mr. Johnstone: One of the dates alleged in the indictment is

July 12th. This check is dated July 14th, which is a very close proximity of time.

The Court: Is that the fact?

Mr. Johnstone: In a conspiracy case, your Honor, the dates cannot be fixed exactly.

The Court: I sustain the objection.

Mr. Patterson: If your Honor please, in order to get the record straight, I would state—

Mr. Johnstone: There is another point, your Honor: One of the counts in the indictment alleges that the conspiracy is alleged to have been begun in January, 1913, and to have continued throughout the year 1913.

Mr. Patterson: That is not correct, excuse me.

The Court: Is there such a statement?

Mr. Johnstone: Excuse me; I will read it.

Mr. Patterson: It says at various times.

The Court: Read it to me. You see the claim is that the check, the last check upon which the indictment is based, is dated the 12th of July, 1913, and that check is dated subsequent to the date of the last check.

Mr. Johnstone: If your Honor please, the crime charged
72 in this indictment is conspiracy.

The Court: Yes; but there can be no conspiracy about a check after the date that is alleged as the date of it in the indictment.

Mr. Johnstone: Under one count of the indictment, the conspiracy is alleged to have been all during the year 1913.

The Court: After those checks were made?

Mr. Johnstone: Yes.

The Court: Where is that?

Mr. Johnstone: The last count of the indictment.

The Court: Perhaps you may be right.

Mr. Johnstone: Page 16 your Honor on the copy that I have.

The Court: I guess you are right, Mr. Johnstone—between the 1st of January and the finding of the indictment.

Mr. Johnstone: The finding of the indictment, yes.

Mr. Patterson: If your Honor please, that does not allege a continuing conspiracy; it alleges and states that at various other times, the defendants conspired but that does not charge that the crime was committed on a particular day. In a proceeding of this kind, time is of the essence of the indictment.

The Court: Must they allege the precise date?

Mr. Patterson: They do allege precise dates; this is simply a drag net thing which really doesn't mean anything.

Mr. Johnstone: In a conspiracy they do not have to allege the exact date in the indictment any more than any other case.

Mr. Patterson: I am addressing the Court; may I finish?
73 Where the date is important, where it is the essence of the crime, or may serve as a defence, the time ought to be stated with accuracy and as to that I refer your Honor to Moore on extradition, and various other authorities which refer to that principle.

The Court: This last indictment charges a conspiracy to defraud

from a time beginning the 1st of January up to the date of the indictment.

Mr. Patterson: They don't allege, if your Honor please, a continuing conspiracy. They allege only that it was made at various times on various dates unknown to them—the time being unknown to them and the people concerned being unknown to them.

The Court: But they cover a specific certain time and say, between that time, they so specify a date, and from that date to the date of the indictment they say there was a conspiracy.

Mr. Patterson: So far as the time is concerned, of the conspiracy, it does not say there was one conspiracy extending over that period, your Honor; it says that at various times conspiracies were made against various people.

The Court: That they did conspire. I think that is enough.

Mr. Patterson: Why, if your Honor please, this indictment would be enough, on a trial, but as a matter of extradition where the demanding State must show the presence of the accused in the State at the time of the commission of the crime, it is not enough; they must allege when the crime occurred, and then show that the accused was in the State at that time.

Mr. Johnstone: They do allege, during the year 1913.

Mr. Patterson: There is no allegation that it happened on any particular day.

The Court: It does allege that there was between those dates a conspiracy to defraud.

Mr. Patterson: "At various times." It does not allege a specific date.

The Court: Certainly specific enough.

Mr. Patterson: I think for the purposes of extradition, they have to allege, your Honor, that the crime was committed on a particular day and they must name that day, and that he was there in the State, otherwise it does not appear that he was a fugitive.

The Court: The conspiracy may have been of such a character as to extend along a certain length of time, and be a certain number of different acts.

Mr. Patterson: It is not alleged that way. It is alleged at various times, but it does not allege that they were committing a continuing act. It alleges a conspiracy on the 1st, and then it alleges a conspiracy at various times, but it does not say that it still continued as a continuing conspiracy.

The Court: Look at page 16.

Mr. Patterson: It says that on the 1st of January they conspired.

The Court: At divers other days between that date and the date of the taking of the inquisition.

75 Mr. Patterson: And on divers other days they conspired.

The Court: Yes.

Mr. Patterson: It does not say that this conspiracy was one that extended throughout the year; it says they conspired on the 1st and on other days.

The Court: Between those dates.

Mr. Patterson: Two, I think, are specified in the indictment, one is the 9th of June and the other the 12th of July. It does not say, if your Honor please, between those dates.

The Court: I so understand that it does.

Mr. Patterson: It alleges repeated occasions on different dates, repeated conspiracies on different dates, it is not a charge that alleges the whole thing as continuing.

The Court: As I understand that indictment, it means to say this: That between a certain date, that is, the 1st of January, and the date of the finding of the indictment, the defendant was guilty of conspiracy extending along through that period. It was a continuous act of conspiracy.

Mr. Patterson: If your Honor please, I don't think that this indictment makes that charge. It charges, first, that on the 1st day of January, these people conspired.

The Court: And that on that date and on other days between that and the finding of the indictment—

Mr. Patterson: But "on other days" does not say it is a continuous conspiracy.

The Court: That is the way I spell it out; that is the way it appears to the Court.

76 Mr. Johnstone: That is the way I construe it, your Honor. I don't think it is susceptible of any other construction.

I take it that these checks may be marked.

The Court: They may be marked in evidence.

Mr. Patterson: I except to your Honor's ruling.

Paper marked Defendant's Exhibit 2 in evidence.

Q. What was that date you said you had a talk with Swinghammer in Atlantic City?

A. July 30th—you mean on the telephone?

Q. July 30th?

A. July 30th; also on July 31st.

Q. Never mind that--July 30th?

A. Yes.

Q. Did Mr. Ireland also talk to him on the telephone that date in your office?

Mr. Patterson: I object to the question as incompetent, irrelevant and immaterial, and has nothing to do with the presence of Mr. Ireland in the demanding State.

The Court: Why he went there on that date in his office?

Mr. Johnstone: Will the stenographer read the last question.

Repeated by the stenographer.

Mr. Patterson: I object to it as incompetent, irrelevant and immaterial, because the only question before your Honor is as to whether or not the accused was within the State of New Jersey and it appears here he was in the State of New York.

The Court: I don't see the relevancy of that.

77 Mr. Johnstone: Your Honor, this witness has testified that this man Swinghammer had some connection with Stewart; he was one of the co-conspirators named in this indictment. He testified he had a conversation from his office in New York with Swinghammer in Atlantic City on July 30th; that the defendant was involved in that conversation.

A. (Interrupting.) I didn't say that, Mr. Johnstone.

Q. That the conversation had some reference to the defendant?

A. Oh, yes.

Mr. Johnstone: Now, the defendant, he says, was in his office at that time. Now, I am asking him, did the defendant talk to Swinghammer, because, your Honor, the defendant himself, or the relator, rather, has testified he was in the State of New Jersey on July 30th; therefore putting these two things together they might justify an inference that his business in the State of New Jersey on the occasion of his visit had some relation to this man Stewart; and I am entitled to the fact for what it is worth; and I want the fact as to whether or not he communicated with Atlantic City prior to his going to the State of New Jersey.

Mr. Patterson: Your Honor would not allow me to show the purpose of the visit to Seabright and it would not be proper to allow the other side to introduce testimony to show the purpose of some other similar act.

The Court: Read the question. Perhaps we may misconstrue the question. Read it, please.

78 Question repeated by the reporter.

The Court: I sustain the objection.

Q. I will repeat this question so there may be no mistake about it: Mr. Ireland could have been in the State of New Jersey many and many a time during the year without your knowledge—during 1913?

A. Why, certainly.

Mr. Patterson: If your Honor please, the relator is here, if Mr. Johnstone wishes to cross examine him.

Mr. Johnstone: We will take that up later.

Mr. Patterson: I say it should have gone right on yesterday or at least this morning, it should have been finished yesterday.

The Court: Recall him for the purpose of further cross examination.

JOHN D. IRELAND, recalled.

Cross-examination continued.

By Mr. Johnstone:

Q. Did you have a bank account in the Little Falls National Bank in the State of New Jersey in the year 1913?

Mr. Patterson: I object to that question, if your Honor please, as incompetent, irrelevant and immaterial. We went over that yesterday.

The Court: I am inclined to sustain the objection if the witness claims his privilege.

A. I claim my privilege.

The Court: He did that yesterday.

Q. Do you know what the privilege means? Or are you saying it parrot-like because your lawyer objects?

79 Mr. Patterson: I object to it as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Patterson: Exception.

Q. Do you know what the claim of privilege means, or are you using those words because your counsel objects to your answering?

A. I understand perfectly.

Q. What does it mean? You claim privilege to not answer this; now tell me what it means.

Mr. Patterson: I object to the question, if your Honor please, as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Patterson: Exception.

Q. Go on, now; you are sitting up there telling us you claim your privilege; what do you mean?

Mr. Patterson: The same objection.

The Court: The same ruling.

Mr. Patterson: Exception.

Q. Will you kindly answer the question?

Mr. Patterson: If your Honor please——

Mr. Johnstone: I object to this interrupting by this counsel in order to give this witness some cue. The question is a simple one and it has been ruled upon.

Mr. Patterson: The Court explained at length the nature of the privilege in response to a request by Mr. Johnstone yesterday.

The Court: What is the point?

80 Mr. Patterson: The point is, the question has been asked and I object to it as being irrelevant; and I refer your Honor to the minutes of yesterday in support of that contention: Mr. Johnstone said——

Mr. Johnstone: I object to his reading this, your Honor. Your Honor knows what happened and I object to his reading it so this witness can hear it. My question I think is a perfectly simple one and does not need any lecture from Mr. Patterson to explain it.

The Court: Read the question to the witness.

Question repeated by the reporter.

Mr. Patterson: I object to the question, if your Honor, please, as incompetent, irrelevant and immaterial.

The Court: The Witness may answer if he knows, if he understands it.

Mr. Patterson: Exception.

A. I understand the—

The Court: If you understand the question, you may answer. If you don't understand it, you may so state.

A. (Continuing:) I don't understand it.

Q. Do you understand the question?

A. No.

Q. You told us yesterday, when certain questions were put to you, that you claimed your privilege and upon that ground you declined to answer. What do you mean when you state you claim privilege?

Mr. Patterson: If your Honor please, I object to that question in that it recites evidence improperly; that was not the way the question was put—the witness did not use the word privilege.

Mr. Johnstone: The witness knows what he did; he is familiar with the thing.

81 The Court: I overrule the objection.

Mr. Patterson: Exception. He didn't use the language "privilege"; the word was not used.

Mr. Johnstone: It is used today.

Q. Mr. Ireland, what did you mean?

A. Can he state it? I don't understand.

The Court: The witness says there is so much talk he doesn't understand the question you are asking him.

A. (Continuing:) I don't know what he wants answered.

Q. You said here that you would not answer some questions because you claimed a privilege. Did you say that?

A. Yes, sir.

Q. Now, I want you to tell us what you mean by that? Do you understand the question?

A. Yes.

Q. Will you answer it?

A. Yes.

Q. Go ahead?

A. I meant by that, privilege to get me into New Jersey—they want to get me into New Jersey.

The Court: That is not the question that has been put to you.

The Witness: That is what I understood.

Q. You mean that if you did answer it, that you might have to go back to Jersey; is that it?

A. No; it might some way tend to incriminate me—I don't know how.

Q. You didn't commit any crime, did you?

A. No.

Q. Then it could not incriminate you if you did not commit a crime?

A. No.

Q. You know better than anybody else whether you committed a crime or not?

A. Yes, sir.

82 Q. So that not having committed any crime a simple question of that kind could not have any tendency to incriminate you, could it?

A. I don't see how it could except the lawyers seemed to think so.

Q. You don't think it could incriminate you?

A. No.

Mr. Johnstone: Now, your Honor, I ask that he be told to answer the question because he himself says it would not incriminate him, that he doesn't think it would.

Mr. Patterson: I object to the question, if your Honor please; it is clearly irrelevant.

The Court: You asked this witness whether it was a crime to have a bank account.

Mr. Johnstone: Your Honor may not have heard all that the witness said. The witness testified he didn't see how this could incriminate him. He is the one who has the privilege, the witness's privilege, and he knows better than his counsel whether he has committed a crime. And when he claims a privilege it is a claim that he must make, and not his lawyer, and also he must have some reasonable basis for making such claim, some reasonable ground for it; a witness is not allowed to come onto the witness stand and tell certain parts of his story and then quietly inform the Court that he will tell so much as he wants to and then tell us that he refuses to do otherwise than help himself by claiming a privilege for the balance. I don't see how that can be claimed and I don't think the law permits him to do that. If he comes into Court here and offers himself as a witness, as he does in this case, and testifies to certain things he can not claim that privilege at this date.

83 Now the subject matter at issue in this proceeding before you is his presence in the State of New Jersey. That may be shown in one or two different ways: We may show it by direct evidence—some one saw him there; we may show it by circumstantial evidence—

The Court: We are wandering away from the question. The simple question is whether or not a witness claiming a privilege from testifying to certain facts on the ground that it may tend to incriminate him, whether or not it is in the power of the Court to say whether he is telling the truth or not.

Mr. Johnstone: But your Honor he has just a moment ago said in answer to one of my questions that he didn't see how it could incriminate him. Now I ask your Honor that the record be read, those last few questions before this argument arose.

Questions and answers referred to read by the reporter.

Mr. Patterson: Now may I be heard, your Honor?

The Court: You may.

Mr. Patterson: Of course, your Honor this is leading a lay witness into a legal tangle, that is what counsel has done.

Mr. Johnstone: The witness has acknowledged here that he doesn't think it will incriminate him.

Mr. Patterson: May I have the privilege of addressing the Court without interruption?

The Court: You may proceed without further interruption.

84 Mr. Patterson: As I say that is leading a lay witness into a question of law. A man may be innocent and he may be condemned without proper hearing——

The Court: Is there any question unanswered?

Last question repeated.

Mr. Patterson: I object to the question.

The Court: I sustain the objection if the witness will say the answer may tend to incriminate him.

Mr. Patterson: The particular question is a simple one as to whether it is a crime to have a bank account, but it is a question of law, it seems to me.

Mr. Johnstone: I will withdraw the question and I will put it this way:

Q. Did you have a bank account in the Little Falls National Bank at Little Falls, New Jersey, during the year 1913?

Mr. Patterson: Now I object to that as incompetent, irrelevant and immaterial.

The Court: I overrule the objection.

Mr. Patterson: Exception.

A. I refuse to answer on the ground it may tend to incriminate me.

Q. You said a moment ago it would not incriminate you?

A. I didn't say that.

Mr. Patterson: I object to that.

The Court: He has a right to ask him that.

A. (Continuing:) I didn't mean to answer that way if I did answer it that way, I didn't mean to imply that.

Q. You did it, at any rate. You are the one that is claiming the privilege and you are the one to say whether it will incriminate you or whether it will not?

A. No, I——

85 Q. Don't you know you simply said that because you didn't want to answer the question?

A. Because I meant what I said.

Q. You thought it would incriminate you, did you?

A. I thought it might tend to incriminate; I don't know how.

Q. You have testified yesterday that you were in the State of New Jersey upon June 19th, July 30th and some day in the early part of August, 1913. Were you ever in the State of New Jersey upon any other occasion during the year 1913?

The Court: Than those he has mentioned, do you mean?

Q. (Continuing:) On any other occasion than those three days that you have given?

A. I may have been possibly down there in August, but I don't think so.

Q. I cannot hear a word you say?

A. I might have been there, possibly, in August; I am not sure.

The Court: In 1913?

A. (Continuing:) I don't think so, as——

Q. How many times were you in the State of New Jersey in the year 1913?

A. Three times. If in August there was possibly a fourth time.

Q. Is this your handwriting (handing paper to witness)?

Mr. Patterson: I object to that question as immaterial.

The Court: What is the ground of the objection?

Mr. Patterson: On the ground that it is incompetent, irrelevant and immaterial. We have been all over the ground yesterday and it was ruled upon yesterday. Mr. Brown conducted the examination upon that subject yesterday. It is all in the minutes of yesterday and I can read it to your Honor from the minutes.

The Court: Whether this is his handwriting.

Mr. Patterson: He showed that check yesterday.

Mr. Johnstone: The check has already been admitted in evidence.

Mr. Patterson: We have already gone into the entire question. They were shown to the witness yesterday and marked for identification and this question would be simply repeating yesterday's examination, he has already been examined on that on cross-examination.

Mr. Johnstone: The checks are already in evidence, and your Honor the purpose of this examination is to prove by circumstantial evidence, circumstantially his presence, and it has a very direct bearing upon the issues before your Honor.

The Court: That was a point not raised when the check was ruled out yesterday.

Mr. Johnstone: That was not raised yesterday.

The Court: I know it was not.

Mr. Patterson: He mentioned what his ground of offer was yesterday.

Mr. Johnstone: I am offering it now on the ground that they are circumstantial evidence of something.

Mr. Patterson: It must have been offered for that purpose yesterday.

The Court: I don't recall it.

Mr. Goldstein: The witness claimed his privilege not to answer.

Mr. Johnstone: I think your Honor was under the im-

87 precession yesterday that these had some bearing upon the question of his guilt of the crime itself.

The Court: It was ruled out for that reason.

Mr. Johnstone: I am not offering it for that purpose.

The Court: It was offered today upon the ground that it was some circumstantial evidence tending to show the presence of the relator in the State of New Jersey at the time of the making of the check.

Mr. Johnstone: That is exactly it, your Honor.

The Court: And I will allow it to be put in for such a purpose. That offer is now made de novo.

Mr. Johnstone: It is already in evidence and I just want to ask him if that is his signature.

Mr. Patterson: That is irrelevant because it has already been testified to and admitted in evidence.

The Court: If the witness will claim his privilege it will be ruled out.

A. I claim my privilege.

The Court: The witness claims the privilege. We are making very little headway.

Mr. Johnstone: In the case of the People v. Tice, in 131st N. Y., as I understand the decision of the Court of Appeals—I don't want to appear as criticising your Honor's ruling.

The Court: Yes; what about that opinion?

88 Mr. Johnstone: That they held, your Honor, that when a witness became a voluntary witness in a case, that that constituted a waiver on his part at that time of the constitutional privilege. I will read it to your Honor.

The Court: We will send for the book.

Mr. Johnstone: I have the extract here from the opinion where it says: "The accused is not compelled to become a witness when he avails himself of the privilege of the statute (reading)."

The Court: That doesn't touch the point at all, Mr. Johnstone.

Mr. Patterson: That is when a man is on trial for a crime.

The Court: That does not touch the point we have under discussion.

Mr. Johnstone: As this witness will not answer, I can't seem to get anywhere.

The Court: We are making very slow progress, and if I am to err at all, I rather to err on this side of the question.

Mr. Patterson: If your Honor please, I wish to get on, but I wish to know if they are through cross examining.

The Court: Are you through, Mr. Johnstone?

Mr. Johnstone: I will have to be through because the witness will not answer any questions.

Mr. Patterson: All right; then I am through.

89 FRANK H. KEELER, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Mr. Keeler, where do you live?

A. 494 Madison Street.

By the Court:

Q. Madison Street, New York?

A. Brooklyn.

Q. Madison Street, Brooklyn. I doubted whether you lived on Madison Street, New York. What is your business, Mr. Keeler?

A. Real estate.

By Mr. Patterson:

Q. Are you acquainted with Mr. John D. Ireland?

A. Yes, sir.

Q. Did you see him at any time during the month of July, 1913?

A. Yes.

Q. When?

A. I saw him on the 12th of July.

Q. Whereabouts?

A. I met him at the Western Union Building.

Q. In the City of New York?

A. Yes, Broadway and Dey Street.

Q. Borough of Manhattan?

A. Yes.

Q. What time of the day?

A. About half-past ten or eleven o'clock in the morning.

Q. How do you fix that date?

A. Because I live in Brooklyn and I got home at a quarter past twelve, right after I left him.

Q. Please continue?

A. I live in Brooklyn and it is about an hour's ride to get home to my home in Brooklyn. I left from Liberty Street—from Broadway and Dey Street at that time, and I got home about a quarter past twelve.

Cross-examination.

By Mr. Johnstone:

Q. What day was it you saw him?

A. The 12th of July.

90 Q. What time of the day?

A. About half-past ten in the morning or eleven o'clock, maybe. It may have been between half-past ten and eleven.

Q. How long were you with him?

A. About ten or fifteen minutes.

Q. You don't know where he went after that?

A. He said he was going to play golf.

Q. Never mind what he said; do you know where he went?

A. Went to play golf, yes, sir.

Q. Do you know where he went; I don't care what he told you?

A. I don't know where he went, only what he told me.

Q. That is the only day you saw him that you recall at present?

A. Yes; with any positiveness.

LAURENCE R. PRIOR, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Where do you reside?

A. Richmond Hill, L. I.

Q. Are you acquainted with John D. Ireland, the relator in this proceeding?

A. Yes.

Q. Did you see him at any time during the month of June, 1913?

A. I did.

Q. Do you recall what date you saw him at that time?

A. On June 10th, 11th, 12th and 13th.

Q. How do you place those dates?

A. By giving him some money.

By the Court:

Q. What are the dates?

A. From a memorandum on my books here.

Q. What dates?

A. 10th, 11th, 12th and 13th.

Q. Of what?

A. June.

By Mr. Patterson:

Q. Where did you see him?

A. At the Terminal Building, New York City.

91 Q. Did you see him at any time during the month of July, 1913?

A. I have seen him on the 10th, 11th, 14th and 15th.

Q. Of July?

A. Of July.

Q. And where was he when you saw him on those days?

A. In the same place.

Q. Do you remember what time of the day it was on any of those occasions you saw him?

A. About one o'clock.

Q. On all the occasions?

A. Yes.

Cross-examination.

By Mr. Johnstone:

Q. Let me have that?

A. (Handing book to counsel.) Those are the dates where the cards are.

Q. Will you turn to the date of July 14th in that?

A. There is no date here July 14th.

Q. Is there any memorandum there of July 14th?

A. None.

Q. Did you see him on July 14th?

A. Yes.

Q. Where?

A. In New York City.

Q. How do you know?

A. On the 15th of July I paid to our landlord \$250; the day preceding that Mr. Ireland and I had a very strong talk together in regard to paying Mr. Amend and he impressed upon my mind very perceptibly to see Mr. Amend on the 15th, which was the next day.

Q. What day of the week was the 15th?

A. I don't know what day it was.

Q. Have you a memorandum of the 15th there?

A. I have a memorandum.

Q. Are you in partnership with Mr. Ireland?

A. I am.

Q. What business?

A. Cold storage.

Q. Where is this?

A. 402 Greenwich Street.

Q. Where was it that you saw him?

A. I think I seen him at the Terminal Building.

Q. Terminal Building?

A. Yes, sir.

Q. What time of day?

A. About one o'clock.

92 Q. How long were you with him?

A. About fifteen or twenty minutes.

Mr. Patterson: Speak louder; I can't hear what you say, Mr. Johnstone.

Q. How long were you with him—can you hear that?

Mr. Patterson: Yes.

A. About fifteen or twenty minutes.

Q. The Terminal Building has a tunnel running from underneath it to Jersey, hasn't it?

A. I believe so.

Q. It doesn't take long to go over, either, does it?

A. I don't think it does.

Q. You have been there, haven't you?

A. Yes.

Q. It takes about ten minutes, doesn't it?

A. About that generally.

Redirect examination.

By Mr. Patterson:

Q. There is just one question I want to ask. In response to a question of Mr. Johnstone's you said you were in partnership with Mr. Ireland, I think. That is a corporation, isn't it?

A. Yes.

ADELIA SICARD, a witness called in behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Mrs. Sicard, where do you live?

A. 104 East 73rd Street.

Q. Borough of Manhattan?

A. Borough of Manhattan.

Q. Are you a sister of John D. Ireland, the relator, in this proceeding?

A. I am.

Q. Do you recollect whether you saw him at any time during the month of June, 1913?

93 A. I saw him on Sunday, the 8th, in the evening after dinner, late in the evening I think about half-past eight until ten or eleven. I saw him on Monday evening, I am not sure whether he dined with us, he spent the evening; I didn't see him after that.

Q. Where was he when you saw him on those dates you speak of?

A. He was at my father's house, 104 East 73rd Street.

Q. 104 East 73rd Street?

A. Yes.

Q. How do you fix those dates, Mrs. Sicard?

A. Because I made arrangements for them to go to the country on the 10th, and I remember he was there the Sunday evening before, because I made a point of his being there and on Monday; my father was going away and didn't expect to see him very often during the Summer.

Q. Your father has died since then, hasn't he?

A. Yes; he died last October.

Q. About how long ago, do you recall?

A. He died, I think it was the 11th of October.

Q. 1913?

A. 1913.

Q. Your father and mother were going to the country on the 10th?

A. On the 10th, the morning of the 10th.

Q. Did you say you requested your brother to come to the house?

A. I did, because he missed the boat the year before when they went, and I made a particular point of his coming on this particular occasion, and I went over it and over it and over it, and I remember it distinctly.

Q. You saw him at your father's house the evening of the 8th and the evening of the 9th of June, 1913?

A. Yes; Sunday and Monday evenings.

Cross-examination.

By Mr. Johnstone:

Q. Mrs. Sicard, the 8th of June was Sunday, was it?

A. Sunday evening.

94 Q. You saw him on Sunday evening?

A. Sunday evening.

Q. The 9th of June was Monday?

A. And on Monday evening.

Q. What time did you see him on the 9th?

A. I saw him in the evening; I am not sure whether he dined with us; he was there, I remember in the evening from eight to eleven.

Q. After dinner?

A. Yes, after dinner he was there—after dinner and spent the evening.

Q. He came there around eight o'clock?

A. He came up after dinner—I am not sure whether he dined or not, I cannot say, I am not sure about Monday, I cannot say that.

Q. He didn't get there until half-past six or seven?

A. Not until half-past six or seven.

Q. At the earliest?

A. Yes.

Q. You didn't see him during the day?

A. Not during the day.

Q. On Monday, the 9th of June?

A. No.

Q. He just came there in the evening?

A. Yes.

Q. He came to have dinner with you?

A. Yes.

Q. So that you don't know where he was during the day on Monday?

A. No.

Q. The 9th day of June?

A. No.

LAURA IRELAND JUNOD, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Mrs. Junod, where do you live?

A. 337 West 71st Street, New York City.

Q. Are you a sister of Mr. John D. Ireland, the relator in this proceeding?

A. Yes, sir, I am.

Q. Did you see your brother anywhere about the 1st of
95 January, 1913?

A. I spent the evening of the 31st with him from eleven o'clock until half-past five the next morning.

Q. That was the 31st of December, 1912?

A. 1913—1912, yes.

Q. And the early part of the morning of January 1st, 1913?

A. He called me up on the phone between ten and eleven from our house.

Q. And that was on what day?

A. January 1st.

Q. Where were you when you were with him on the evening of December 31st, 1912, and early morning of January 1st, 1913?

A. I met him at the Belmont, the cafe de Paris.

Q. All the time you were with him in the City of New York?

A. What?

Q. You were with him in the City of New York?

A. Yes, sir.

Q. From the evening of the 31st of December, 1912?

A. Yes.

Q. To the early morning of January 1st, 1913?

A. Yes.

Q. Did you see your brother at any time during the month of June, 1913?

A. I saw him on the evening of the 9th, he came in my father's house at half-past eight, and took me home and stayed at my house, and stayed until one o'clock.

Q. Until one o'clock the morning of the 10th?

A. Yes.

Q. Did you see him on the 10th?

A. Yes; I saw him at the boat. He came to see my parents at the boat. I went to the polo game in the afternoon. I was with him from two to seven.

Q. Where was this boat?

A. Down at the Hudson River line—day line.

Q. 42nd Street?

A. 42nd Street.

Q. New York City?

A. New York City.

Q. About what time did the boat—did you see him at the
96 boat?

A. Why, I think the boat leaves at nine o'clock—yes, I think it is at nine o'clock.

Q. You saw him on that boat?

A. I saw him at the boat.

Q. Where did the polo game take place to which you went with your brother?

A. Out at Long Island, Piping Rock, I think.

Q. What time did you get to the game?

A. I met him in the Pennsylvania station at a quarter to two and we took the four o'clock train.

Q. And went with him to the game?

A. I went with him to the game.

Q. And went with him to the polo game?

A. Yes.

Q. In Long Island?

A. In Long Island.

Q. On the 10th of June?

A. The 10th of June.

Q. What time did you get back from the polo game?

A. I think we got in about seven o'clock.

Q. Long Island station?

A. Yes, Long Island.

Q. Did you see your brother any time during the month of July?

A. I saw him on the 2nd of July.

Q. Whereabouts?

A. Why, he was coming out of the Ritz with someone,—it was about six o'clock.

Q. The Ritz-Carlton Hotel in New York?

A. The Ritz-Carlton Hotel in New York.

Cross-examination.

By Mr. Johnstone:

Q. You don't live with Mrs. Sicard?

A. No, I have my own house.

Q. You didn't live with her in June, 1913?

A. No. I have always had my own house.

Q. As I understand it, Mr. Ireland was with you on New Year's Eve that night, and with you on the early morning of the New Year?

A. Yes.

Q. So you don't know where he was during the day of January 1st, 1913?

A. Yes, I do.

Q. I mean not of your own knowledge?

97 A. Yes, I know of my own knowledge because he told me what he was going to do.

Q. You know that does not matter what he told you?

Mr. Patterson: Speak up loud, I can't hear what is being said, Mr. Johnstone.

Q. You were not with him?

A. No.

Q. Then you don't know if you didn't see him?

A. No.

Q. Now, coming to the 9th of June, you say you saw him the 9th of June?

A. I did.

Q. And again you fix that date by the fact that you go to a polo game the next day?

A. No, I fixed that date because my parents were going off the next day and we all meet at their house the night before they go off as a general rule.

Q. What time of the day on June 9th, did you see him?

A. It was about half past eight in the evening.

Q. In the evening?

A. Yes.

Q. And at that time he was on his way to your father's house, was he?

A. I saw him at my father's house.

Q. You saw him at the same place, Mrs. Sicard saw him?

A. Yes.

Q. You don't know where he was during the day time on June 9th; that is to say, Mrs. Junod, you didn't see him during the day time on June 9th?

A. I did not.

GEORGE COGGILL, a witness called on behalf of the relator, being first duly sworn, testified as follows?

Direct examination.

By Mr. Patterson:

Q. Mr. Coggill, where do you reside?

98 A. 1033 Lexington Avenue, New York City, Borough of Manhattan.

Q. You are a lawyer?

A. I am.

Q. In business in New York?

A. Yes.

Q. Where is your office?

A. 40 Wall Street, Borough of Manhattan.

Q. Are you acquainted with John D. Ireland, the relator in this proceeding?

A. I am.

Q. Did you see Ireland at any time during the month of June, 1913?

A. I did.

Q. When did you see him during that month?

A. I saw him on Saturday, June 7th, in the afternoon, at Garden City, Long Island, at the golf club. I played with him there in the afternoon; and then I played with him again all day on Sunday, which was June 8th, going down early in the morning and com-

ing back in time for dinner. I dined at the club, University Club, 54th Street and 5th Avenue, Borough of Manhattan, on Sunday night, June 8th; and to the best of my recollection he dined there with me that evening.

Q. Do you recall any other days in June when you saw Mr. Ireland?

A. No, I saw him frequently on Saturday afternoons and Sundays, but I don't—I saw him at the club frequently in the evening, but I don't recall any other specific date in June.

Q. Did you see Mr. Ireland at any time during the month of July, 1913?

A. I saw him July 12th, in the afternoon, at the Garden City Golf Club, Long Island. I was with him down there that afternoon and I think—this I am not positive of—we dined at Garden City; I returned to New York with him from Garden City that night. I played golf with him all day the next day, which was Sunday; going down early, and I dined with him Sunday evening at the club in New York City.

Q. Did you see him at any other time during July, that
99 you recall?

A. Yes; this is on a Saturday and Sunday, the 12th and 13th. I saw him on Monday evening after dinner in the University Club in New York City, on Monday, which was the 14th.

Q. Did you see him anywhere around the 4th of July?

A. Yes; I saw him on July 5th, he came to see me up in York Village, Maine. I was spending the 4th up there, and he was to have come on the 4th, but I remember he got there on the 5th late in the afternoon.

Q. Do you remember how long he was there?

A. Yes; he stayed there until the next evening and went down on the five or six o'clock train.

Cross-examination.

By Mr. Johnstone:

Q. What day was this?

A. That was on the 6th of July.

Q. I suppose there were numerous occasions during the months of June and July, 1913, when you did not see him?

A. Of course.

Q. And he could have been anywhere?

A. Yes, sir.

HELEN M. CAMPBELL, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Miss Campbell, where do you live?

A. 104 East 73rd Street.

Q. Are you the companion of Mrs. Ireland?

A. Am I what?

Q. Are you a friend and companion of Mrs. Ireland?

A. Yes; I have lived with her over thirty years.

The Court: Of Mrs. Ireland, the wife of the relator?

100 Mr. Patterson: Mrs. Ireland, the mother of the relator.

A. (Continuing:) Yes, the mother.

Q. Mrs. Ireland is in rather delicate health at present?

A. I can't hear you.

Q. Is Mrs. Ireland in rather delicate health at present?

A. Yes.

Q. She is out of town?

A. She is in Palenville.

Q. How old a lady is Mrs. Ireland?

A. 76.

Q. What is her condition now?

A. She is not at all well.

Q. Did you see Mr. Ireland at any time during the month of June, 1913?

A. Yes, I saw him on the 8th and on the 9th and on the 10th.

Q. How do you place those dates from memory?

A. Because we went to the country and I went with the family to the country on the 10th; and Mr. Ireland was there on a Sunday evening and on a Monday evening he came to see us, and on Tuesday, the 10th, he came up to the boat, the Albany day boat, at nine o'clock, and put us on board.

Q. When did you get on that boat?

A. 42nd Street at nine o'clock.

Q. Borough of Manhattan?

A. Yes, New York City.

Cross-examination.

By Mr. Johnstone:

Q. On the 9th of June, Miss Campbell, 1913, you did not see him at all until evening, did you?

A. No.

Q. You don't know where he was during the day?

A. No.

Q. The 8th of June was a Sunday.

A. He was there Sunday evening.

Q. Did he dine with you on Sunday evening?

A. I am not sure he did; he was there I know.

Q. Was he there to dinner?

A. That I am not sure of.

101 Q. What is your best recollection?

A. My recollection is that he did.

Q. That he dined there on Sunday evening?

A. Yes, sir.

Q. That is Sunday the 8th?

A. Sunday the 8th.

Q. You are sure he was not there during the day on the 9th?

A. Yes; I know he was not there; he was there in the evening; he came at half past.

Q. About half-past eight?

A. Yes, sir.

MARGARET LAWSON, a witness called on behalf of the relator, being first duly sworn, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Miss Lawson, where do you live?

A. 2 West 106th Street.

Q. Are you acquainted with Mr. John D. Ireland, the relator in this proceeding?

A. I am.

Q. Did you see him at any time during the month of June, 1913?

A. Yes, sir, frequently.

Q. Can you remember any of the dates on which you saw him?

A. Yes; Mr. Ireland came to tea with us in the afternoon of Sunday, June 1st.

Mr. Johnstone: Speak up louder, please; I can't hear.

A. (Continuing:) June 1st, Sunday afternoon, he came in late and had tea with us and stayed on to supper.

Q. Do you remember any other dates in June?

A. Yes, the night of June 2nd.

Q. I beg pardon?

A. The night of June 2nd, Mr. Ireland and my sister went to see Mlle. Modiste.

Q. In New York City?

A. Yes.

Q. I forgot to ask you, on the first occasion you testified to, that was on June 1st?

A. June 1st.

102 Q. That was in the City of New York?

A. Yes, sir.

Q. After June 2nd, do you recall seeing him?

— Yes; I saw him on the 4th of June.

Q. Where was he then?

A. He met us at the Grand Central station, my sister was going to Maine.

Q. Did you see him at the Grand Central Station, New York?

A. Yes.

Q. Did you see him again after the 4th of June?

A. Yes, I saw him frequently; I can't remember any date except the 9th. I did see him on that date and I talked with him a great many times over the telephone.

Q. When was this?

A. June 9th.

Q. What time of day?

A. He called me up early in the morning to tell me the boat my brother was coming in on, the George Washington, was sighted. I was very anxious to know when he was to get in. He called me up also in the afternoon to let me know the boat had gotten in, and he told me and then he telephoned me again the evening after dinner, and also talked with my brother about his trip.

Q. Did you see him on any other occasion after June 9th that you recollect?

A. Yes; I can't remember any other exact dates except the 29th.

Q. The 29th day of June?

A. The 29th, yes.

Q. You saw him on the 29th?

A. Yes, I dined with him at the Ritz.

Q. In New York City?

A. Yes.

Q. Did you see him during July?

A. Yes.

Q. When did you see him in July?

A. I met him where the Boston train meets the train from Maine; I don't know where the car is put on, but we went to Biddeford together with my sister.

Q. When was that?

A. The 3rd of July.

103 Q. And he went on to Biddeford Pool?

A. Yes, sir.

Q. How long was he at Biddeford Pool?

A. He was there the 3rd and 4th, and he went away the morning of the 5th.

Q. Did you see him any other time during the month of July?

A. Yes, sir; I saw him on the night of the 23rd of July?

Q. The 9th and the 23rd?

A. No, the night of the 23rd.

Q. Where did you see him then?

A. I saw him at my home, Mr. Ireland came to spend the evening.

Q. At your house?

A. Yes, sir.

Q. In New York City?

A. Yes, sir.

Cross-examination.

By Mr. Johnstone:

Q. Miss Lawson, between the 5th and the 23rd of July, you were in Maine, were you?

A. Yes.

Q. Was he there, Mr. Ireland?

A. Mr. Ireland went up with us, I know; after he started away, after the 5th, I don't know.

Q. He went up with you on the 3rd as I understood you to say, or he left on that day?

A. No, in the morning of the 6th.

Q. Left on the morning of the 6th?

A. Yes, sir.

Q. And then didn't you see him between the 6th and the 23rd?

A. No, I was away.

Q. So you could not have seen him?

A. No.

Q. I see; so you don't know where he was during that period?

A. I do not know.

Q. You understand what I mean; you don't claim to have seen him between the 6th of July and the 23rd?

A. No.

Q. What boat was coming in from Europe?

A. My brother, Dr. Lawson, came from Europe. I don't
104 know the exact time, June 9th. He got in about 11 or 12
o'clock, I am not sure which; I didn't go down to meet him.

Q. What day did the boat get in?

A. June 9th.

Q. Did the boat dock on the 9th?

A. He got in on the 9th, I suppose he did; I was not there.

Q. Do you know what date the boat docked?

A. Yes, the "George Washington" arrived on June 9th, Monday I think.

Q. Did the boat dock on that date?

A. Absolutely.

Q. What time of day?

A. I was not there to meet it.

Q. The boat came in I thought you said on that date?

A. I think it did between 11 and 12; I am assuming so as I think I saw him I think about 11 o'clock.

Q. I don't want to know what you know from asking anybody else, Miss Lawson; all you are required to give here is to give testimony of what you know and I want to know what you know?

A. All I know is he arrived on the morning of June 9th, I think about 11 o'clock.

Q. You say you remember very vividly that Mr. Ireland telephoned you; don't you remember the hour of the day at which your brother arrived?

A. I think he arrived at about eleven o'clock.

Q. On what day?

A. On a Monday, June 9th.

Q. On the 9th?

A. Yes.

Mr. Patterson: Mr. Johnstone, will you speak up a little louder, please; I can't hear you.

Q. Miss Lawson, see if I understand this correctly now, because this is important you know; did I understand you to say, Miss Lawson, that this boat, whatever boat it was——?

A. "George Washington"—

105 Q. —"George Washington" docked—you know it docked, Miss Lawson, don't you?

A. Absolutely.

Q. Docked at her pier somewhere between 11 and 12 o'clock?

A. That is to the best of my knowledge.

Q. On June 9th?

A. Yes.

Q. Did you see Mr. Ireland on July 9th?

A. I did not.

Q. Somebody telephoned you, you say, on the morning of June 9th?

A. No, not somebody did, I say Mr. Ireland did, I know his voice perfectly.

Q. Somebody telephoned you, if Mr. Ireland did, that is somebody, isn't it?

A. Yes.

Q. Now, keeping that in mind, somebody did telephone to you about the boat?

A. Absolutely.

Q. And that somebody was Mr. Ireland?

A. Yes, sir.

Q. But you don't know where he was? Don't tell me something, you know, that he told you, because I only want to know—you are only allowed to testify to things that you know, not to what somebody else told you. Obviously you could not know of your own knowledge where he was located at the other end of the wire?

A. I cannot testify about the boat, then; I was not there to meet it.

Q. You can testify, of course what I mean is this, you don't know where he telephoned you from?

A. I know it is New York City.

Q. You don't know it, Miss Lawson?

A. Yes, I do, because everyone knows the difference between a long distance telephone and a local telephone.

Q. Well, might he not be over in Jersey City?

A. Well, I have never telephoned to anybody in Jersey City.

106 Q. I know, but he may have been over on that side of the river when he telephoned you, could he not have telephoned over to you?

A. Don't they usually say, some other city is calling?

Q. Not always in Jersey, because as they are connected on the city wire?

A. Well, I don't know.

Q. Of course not. Of course if anybody called you up from Buffalo, we will say, you would know the difference, but you also know that Jersey City calls around here are the same as the city calls, and is not a long distance call; you know that. What I mean is this, you didn't see him on the 9th. He telephoned you, but you don't know of your own knowledge where the telephone message came from?

A. No, of course not.

Q. Now, the boat arrived at eleven o'clock?

A. On the same ground I was not there to meet the boat.

Q. All right, we have been through that; the boat arrived. Well, we have got all that; we know the boat arrived. You didn't see him at all on the 9th, did you, Miss Lawson?

A. No.

Redirect examination.

By Mr. Patterson:

Q. What date did you say that Mr. Ireland left Biddeford Pool in July?

A. July 3rd.

Q. He went there on the 3rd?

A. Yes.

Q. What time did he leave there?

A. I would have to look at the date: If I had a calendar—may I look at this one.

Q. You said it was either the 5th or the 6th, but it really don't make much difference.

Mr. Patterson: Before I go into the argument, do I understand that the other side rests, I don't wish to proceed without something definite.

Mr. Johnstone: Have you rested?

The Court: Do you rest, Mr. Johnstone?

Mr. Johnstone: I want to know if he has finished.

107 Mr. Patterson: I rest when I get the testimony of this ill witness, Mr. Carberry, that is the only thing I have left; I will rest after I get him disposed of.

If your Honor please, I wish to make some arrangement to take the testimony of this man Carberry. I have here an affidavit from him and I am willing to stipulate if he were called he would testify to it if the other side will join with me, and then we will not take the time to go into his testimony.

Mr. Johnstone: We won't stipulate to that.

The Court: Is that essential. Suppose you have a preliminary argument as to its necessity.

Mr. Patterson: If your Honor please, I don't wish to make an argument until I know the other side rests.

The Court: You might find that such testimony is not necessary.

Mr. Patterson: But then you see your Honor, if they don't rest I am in this position—

Mr. Johnstone: Why don't you rest now, with the understanding that this matter may be renewed.

Mr. Patterson: Does Mr. Johnstone state he has some witnesses to put on?

Mr. Johnstone: I will wait until Mr. Patterson gets through talking.

Mr. Patterson: I will rest with this understanding, your Honor, that I may be allowed to take the testimony of Carberry in some

manner; that is the only thing that keeps me from resting now. I have a great deal of proof that I am not putting in here—
108 I think it is not necessary, but I think Mr. Carberry's testimony is of importance.

The Court: That is the question that I repeat again: Is it necessary or will it be necessary?

Mr. Patterson: If your Honor please, the defendant is accused of having committed a crime on the 9th day of June, at Atlantic City, N. J.

The Court: That is only one of the indictments.

Mr. Patterson: I have a right to meet them, have I not, one at a time? And I have to meet them all piece by piece, and that is the only way of meeting them; and I think we ought to be allowed to show that as far as that is concerned whatever may be the case on the other dates, that he is not a fugitive from justice in respect to that particular crime. I have got to eliminate them one by one.

The Court: If the proof shows that the defendant was within the jurisdiction of the State of New Jersey at any of the times mentioned in the indictment or indictments, that is enough, is it not?

Mr. Patterson: No, sir, not in this case.

The Court: You think they must show that he was there on all of the dates, and at all of the times?

Mr. Patterson: No, sir, but they have to accuse him of being there when the crime was committed. Then another crime is alleged as of date June 9th, and another July 12th. They don't say he committed a crime on any particular day aside from that, they simply say, you committed a crime, and we are not prepared to meet
109 anything until they say when that date is, and we want to know when that date is.

The Court: We must only take the papers as we find them.

Mr. Patterson: Another thing. That is the reason, your Honor, I don't care to argue this case until they are through, because I might suggest something they may supply, and it is not quite fair to ask me. When they are through and we are all through I would like then to be heard. I would much prefer to submit briefs.

The Court: Let us see whether there is any necessity for it.

Mr. Patterson: As I view this cause, this is a case that involves a very interesting question of law at the best—I mean at the worst. The papers, the extradition papers themselves show that this application is based on the theory of constructive presence within the State.

Mr. Johnstone: Oh, no, you are mistaken about that.

Mr. Patterson: The requisition of the Governor of New Jersey says that the alleged fugitive kept without the State; and the affidavit annexed thereto says the crime was committed during the absence, or words to that effect, of the relator. The indictment does not allege that he did anything, but it alleges that the other men did an act.

The Court: Well, now, what is the point? How far have we got?

Mr. Patterson: The point is this, your Honor, that I wish to take the testimony of this man Carberry.

110 The Court: Is it necessary, I repeat?

Mr. Patterson: It is in my judgment.

The Court: I don't want to express any view until you have been heard on what the last indictment means. If it means anything, you will let me get your views as to that.

Mr. Patterson: There is a similar indictment in the case to which I called your Honor's attention that was decided by Gov. Fort. In that case an application was made to Governor Fort by the public prosecutor of Hudson County requesting that Governor Fort issue his requisition to the Governor of the State of Illinois for the rendition of J. Ogden Armour. J. Ogden Armour's case was and is an almost identically similar case to this. It had an indictment with the same dragnet clause with the same prolix language. There were certain specified dates mentioned in it and other dates. On the specified dates certain overt acts were charged in the indictment.

The Court: What was the case there?

Mr. Patterson: He was accused of conspiracy, conspiracy to commit a crime, just the same as the accused in this case is accused of conspiracy to commit a crime. They were, so it was alleged, engaged in a conspiracy to corner the meat market and to raise the price of the necessaries of life. This case set forth the fact in a petition to Governor Fort. The Governor held that it must appear from the indictment that the overt act was charged at the time they said the man was in the State. That is this case.

111 The Court: Is not that charged in the indictment?

Mr. Patterson: No, sir.

The Court: It is not?

Mr. Patterson: No, sir. They must allege the date.

The Court: They have.

Mr. Patterson: No, sir, not in that dragnet thing. They don't allege anything.

The Court: They allege between two certain dates.

Mr. Patterson: While it may be proper to draw an indictment for a trial in that way, an indictment that is in an extradition proceeding has to specify; and I would like if I can find it readily to read the language of the Governor in treating that very contention which was made before him. That is the very thing before your Honor at this time, and it is brought up in all these extradition cases, and in some of them it has been disposed of.

Governor Fort, in considering this application said: "The sole question which remains to be considered is whether under the general allegation of the indictment that the overt acts continued on, each and every day from the first day of March, 1908, until the time of the finding of the indictment, the affidavit as to the presence of J. Ogden Armour in Hoboken is sufficient for these proceedings," but he held that it was not. You see it is entirely similar.

The Court: Why did he hold it was not sufficient?

112 Mr. Patterson: I will read his reasoning: "While it is perfectly proper upon the trial of an indictment that the State, which it appears obtained jurisdiction over J. Ogden Armour,

and the prosecution would not be limited—(reading),” and that is just this case.

The Court: It may be.

Mr. Patterson: It presents at least in its most unfavorable light to the relator, it presents an interesting question of law. I think that probably when we thresh the law out, I think your Honor will be persuaded he should not and ought not to be surrendered. At the very best it is a close question; it comes closer than any other case I have been able to find. I rely very strongly on this case of Governor Fort's; I recommend it very keenly to your Honor's attention; it is well considered and well reasoned, and the authorities are looked up to a great extent.

And as to Gov. Hughes, I have the case that was before him which has a very strong bearing on this. There the precise question was presented whether the man—whether or not the rendition should be granted based on this dragnet clause. This may be all right in the case of a trial of a cause, but in view of the fact that these other dates have been specifically mentioned, I desire to take the testimony of Mr. Carberry. It is a serious question if your Honor should by chance think that the relator should be surrendered. In that case I am going to appeal to your Honor under Section 2060 of the Code for bail and for a stay in order to take it up to the Appellate
113 Division, because this is really a serious question. It is a thing that I feel very keenly about. I think there is a real question of law here and I wish to have it considered carefully by your Honor, and if an adverse decision is reached, I desire to test it out further.

The Court: I will hear from Mr. Johnstone, as to what he thinks of the matter.

Mr. Johnstone: If your Honor please, I think that Mr. Patterson is laboring under a fundamental misapprehension in respect to the law that underlies this proceeding.

It is undoubted, and we do not dispute it, that a mere constructive presence in the State is insufficient for extradition. That was definitely decided in the Hyatt case, not only by the Court of Appeals, but by the United States Supreme Court to which the case subsequently went. In the Hyatt case the question raised was this: Corkran had not been in the State of Tennessee, the demanding State, but under and through and by virtue of an agent, he committed a crime there. Of course a man may commit a criminal act in a State through an agency or through some other person without ever going there himself. Corkran's agent made certain false representations by means of which they procured property in the State of Tennessee, but he had never been there. Some time after the crime had been completely consummated, the crime was fully completed, Corkran went into the State of Tennessee on a visit in no way connected with the crime, because
114 the crime was over; and the representatives of the State of Tennessee sought to extradite him from New York; and this was specifically based upon the proposition of his constructive presence in the demanding State, the claim being that it was suf-

ficient under the Federal Constitution and law to authorize extradition. That was the question, your Honor, that was exactly and specifically presented to the Court of Appeals for decision; and the learned Chief Judge, Cullen, who wrote the opinion—the facts were all stipulated; it was stipulated on the record that Corkran had not been in the State of Tennessee at the time of the commission of the crime. The point did not turn, your Honor, upon his being present there upon any particular question of dates in the indictment. But it was specifically, according to the stipulation, agreed that he was not there at the time that the offenses had been committed, but the State maintained that they had a right to extradite him upon the theory of constructive presence; and Judge Cullen in construing the stipulation said that was the interpretation of the counsel for all sides, which had been put upon it. They decided constructive presence was not sufficient and the U. S. Supreme Court affirmed the finding.

The Court: Was not sufficient?

Mr. Johnstone: Was not sufficient. I call this clearly, this particular point to your Honor's attention in view of the emphasis that has been laid upon the constructive presence.

Now, it is undoubtedly the law that a defendant if he never set foot in New Jersey, though he might commit a crime there, they could not extradite him for it, he never having been there
115 during the time when the crime was in the course of commission.

Now, this kind of a crime, conspiracy, of course, as it is known, it is a very peculiar crime; it is almost impossible in drawing an indictment or in proving a conspiracy to determine upon what specific date the conspiracy was formed; because as a general rule the very existence of a conspiracy itself is a matter that has to be collected from a number of independent and collateral circumstances; and it is from the conjunction of all these circumstances that we circumstantially infer the meeting of the minds at some period during the progress of these acts. Now, we scarcely ever can tell, in a conspiracy case, when the minds met. The gist of conspiracy is the unlawful agreement or meeting of the minds; and we don't have to show that the different parties to the scheme met together and entered into an agreement in words. We have to infer the agreement from different steps taken by different persons extending, frequently, and indeed, usually, over a long period of time.

Now, that is precisely the offense which is alleged in the last count of this indictment. It is alleged here, and your Honor will have to assume that the facts before the Grand Jury supported the Grand Jury's conclusions of fact, that, as set forth in the indictment, this conspiracy was in continuous operation during the year 1913; that it began about the 1st of January, 1913, and continued through that year. So that this is the situation we have here: We have a crime of
116 a continuing nature going on for a long period of time; overt acts being committed by all of the parties with a general design, at different times, running for the period of a year.

Now, in order to render this defendant extraditable, we don't have

to show that he committed any act within the State of New Jersey, in connection with this crime, because it is well settled, your Honor, that the question of the guilt or innocence of the accused person can never be gone into on a proceeding of this kind. The sole question that your Honor is charged with determining—and it is a question the responsibility of determining which, rests really upon the Governor—is as to whether he was within the jurisdiction, the territorial jurisdiction of the State at the time that the crime was in course of commission.

I want to point out and distinguish between the commission of an overt act by him and the fact of his being there when the act was committed. If we adopted as the basis for extradition, any such proposition as his presence there at the time he committed the overt act, your Honor can readily see we would then be entering into the investigation of the question of whether he committed the crime, a question of which we have no jurisdiction whatever, and for which he can only be tried in the jurisdiction where the indictment was found and where the act was committed. We say that the crime was committed or was in course of commission some time during a period of the year 1913, and we say in addition to that that this relator was
117 actually present on the soil of New Jersey during that time, then under the law he is extraditable, because the question whether he be connected with the conspiracy, or whether he did anything there which would connect him with the conspiracy, would be a question which would have to be tried by a jury in the other State, and is not before your Honor for decision.

Now, your Honor, in the Hoffstot case, with which I am more or less familiar as I was connected with the case—in fact I argued it in the Circuit Court. It came before his Honor, Gov. Hughes, who is now in the Supreme Court. And he pointed out in his opinion: That conspiracy was a peculiar crime; that the fact of the crime had to be collected from a number of circumstances; and that inasmuch as it appeared that Hoffstot was in Pittsburgh, Pa., at the time that the conspiracy was going on, that rendered him extraditable.

The same proposition was passed upon by the Appellate Division, in this Department in the Meeker case. Meeker was charged in the State of Texas with a conspiracy to defraud a bank and certain people connected with the bank. He resided in a town called Texline, Texas. We had a hearing in this part of the Court, and the evidence showed that Meeker went down to a place called Clayton, New Mexico, which is ten miles away from the Texas border; that he was there visiting a man named Ritchie, and that the purpose of the visit to Clayton was to enter into this scheme; that one day, while taking a ride in a buggy, they went over the Texas border, and they went into the State
118 of Texas; and there was testimony I think from one other witness that upon one occasion Meeker had been seen in a saloon in Texline, Texas. The Court there dismissed the writ, and the Appellate Division held, that inasmuch as while this criminal scheme was going on, and while this conspiracy was being formulated, the fact that Meeker was in the State of Texas during this constructive period of the conspiracy rendered him extraditable; that this extradi-

tion was not sought merely upon the theory of a so-called "constructive presence."

Now the whole point in these cases comes down to this in every case, and the point that has been determined is this: Is the demanding State seeking to extradite upon any supposed theory that they are entitled to extradition, even though the person was not in their State? If that is so, he is not extraditable. But if it was shown he was in the State when the crime was going on, he is extraditable. The theory that underlies this question of interstate rendition is this:

When the Union was formed it was considered essential to the safety and proper carrying out of the laws of the States, each one independent within its own territory, that a man should not escape from justice by passing over an imaginary line between two of these political divisions of the United States called States. Therefore when the word "flee" in the Constitution, came up for construction, they held that "fleeing" meant that he would have to be in that State at some time and leave it; it didn't mean that he ran away with hue

and cry after him; it means, was he on the soil of that State
119 so that had he remained there when criminal proceedings were about to be begun, the State would have had him within its jurisdiction and could have arrested him. Now, if he has left the jurisdiction after the crime was committed, then, when criminal proceedings are brought against him, and he is found in another State he is extraditable; and in all the cases in the United States Supreme Court that have considered this subject, and that has been very often, they have always given a very broad and liberal interpretation to these extradition laws; and almost invariably they have stated in their opinions, that habeas corpus is not the place to try out matters that refer to the guilt or innocence; and the only question to determine is: Was the man in the State at or about the time that the crime is alleged to have been committed? If we show a physical presence in the State at that time, we have shown enough.

Now, your Honor, in this case before you—I am not going to call any other witnesses or put in any other testimony, because we have sufficient now to bring up this legal proposition, which is this:

We have the conceded evidence of the prisoner himself that he was in the State of New Jersey on three different occasions while this conspiracy was in progress and was going on. In addition to that, we have the evidence of those two checks, dated at Little Falls, N. J., one bearing the date of July 14th, and another of June 9th, which

were part of the *res gestæ* of the conspiracy. Now, those
120 checks upon their face indicate, and it is testified to by his lawyer, that they are in his handwriting, and that they are dated at Little Falls, and that is some circumstantial evidence tending to show the personal presence at that place at the time that these checks were drawn; I don't say that it is conclusive evidence but I say that your Honor has the right to accept it as some evidence from which you may draw the inference that he was present in that town when he drew that document.

And then it is uncontradicted on this record. When I asked him

as to this, that is, whether it was his signature, he said he declined to answer, on the ground it might incriminate him; so it stands uncontradicted. They have the means at hand to contradict it, if untrue, and they have offered no word of evidence to contradict the fact that is shown upon the very face of the paper—that the man was in Little Falls, and drew that check on that day.

Now, we have the defendant's presence conceded and proved by Miss Carpenter on three different days, and we have the circumstantial evidence from which it is inferable and may be inferred he was in the State of New Jersey and doing business with this bank on these particular dates, and your Honor, these two checks are in evidence. What have they offered here in opposition to that? They have brought in here a few witnesses who say that they saw him in July in New York, and an evening in June in New York. Another saw him here two or three days in July, and somebody else a week,

121 whereas this runs over a period of a whole year; it is unquestionably the fact that every date of a whole year is covered by this indictment. And in addition to that, take the instance of June 9th. There has not been a single witness called here relative to that specific date. We call attention especially to the force of our argument relative to that date.

Mr. Patterson: That is the reason why I asked your Honor to allow me to take the evidence of this man which referred to the 9th; that is the very point I want to be heard on.

The Court: I will give you a chance to answer the argument of Mr. Johnstone after recess.

Mr. Johnstone: So much for the evidence. I think your Honor will find perfectly clearly that there can be no dispute about it, that Mr. Patterson has got the theory in his head of constructive presence after reading these voluminous opinions in the Corkran-Hyatt case. I want your Honor to bear in mind these two salient facts, and if your Honor has them in mind, I don't think you will have the slightest doubt as to what action you should take, and that is, if the defendant was within the State at any time when the conspiracy was in operation, when the crime was being committed in New Jersey, why, that is sufficient, and that one of the counts in this indictment covers the whole year of 1913, and that it charges a conspiracy continuing. It is concededly the fact, from the testimony of relator that he was within the State of New Jersey during the period and under
122 circumstances that do not negative the possibility of any connection with this conspiracy whatever.

The Court: Mr. Patterson, I will hear you at two o'clock.

Mr. Johnstone: One single word more about the Armour case; this man Armour is the pork packer of Chicago, and he was indicted for one of these conspiracies in restraint of trade. The question there did not come up as a surrender, your Honor. New Jersey was the demanding State, and the attorney general of New Jersey requested the Governor to make a requisition upon the Governor of Illinois for Armour's surrender into New Jersey; isn't that so?

Mr. Patterson: No, it was the prosecuting attorney.

Mr. Johnstone: I think that the authority of the Hoffstot case practically settles this point; also the Meeker case. The facts in this case which are essential are not open to debate and the relator is clearly extraditable.

Adjourned to two o'clock P. M.

After Recess.

Mr. Patterson: The question I wish to have disposed of here is as to the taking of the testimony of this man Carberry.

The Court: We are coming back to that question again. I thought that you were going to argue that proposition that was discussed before adjournment by Mr. Johnstone.

Mr. Patterson: The argument of Mr. Johnstone was directed largely to the blanket indictment. I call your Honor's attention in that connection to the fact that the blanket indictment, that is the 6th count, does not allege a continuous conspiracy. It alleges, "That on the 1st day of January, and on divers other days, between that day," and another day, this accused conspired and that certain acts at times unknown, etc., that is not, if your Honor please, an allegation of continuous performance.

The Court: Why not?

Mr. Patterson: It says at divers other times. It does not say it continued. It says at divers times it did thus and so.

The Court: No, but it says between that date.

Mr. Patterson: "At divers times," that might refer to the two times set forth specifically in the indictment.

The Court: Is it your contention that they have got to specify each date in the indictment upon which the acts were committed?

Mr. Patterson: Unless they make a continuous charge.

The Court: They do substantially that in the indictment.

Mr. Patterson: The indictment says: "That the said Charles Stewart" with certain alias (reading the count of the indictment). The testimony is that the relator has admitted that he was at a certain place, but the indictment does not charge any crime was committed at that time. It says, "divers other days."

The Court: We know very well that the nature of the crime is such that the period of conspiracy, that is to say, when it is being constructed, might extend over a long period.

Mr. Patterson: Quite so.

The Court: And I indulge in the presumption that it is not complete at its inception, but that it is being constructed and formed from certain periods to certain period, and it is not complete until the crime is committed.

Mr. Patterson: Yes, if it were so alleged, but if your Honor please, it is not so alleged.

The Court: That is my understanding of the indictment; that is the way I read it.

Mr. Patterson: But your Honor will see it says, divers other days

between that date. On divers other days, does not state a continuous conspiracy, but it states a conspiracy at different times.

The Court: In my view, they do not have to allege every day that it was committed.

Mr. Patterson: Not if they are under an alleged continuing conspiracy, if they had so alleged.

The Court: They do.

Mr. Patterson: I submit that they don't. I pass on to another point, if your Honor please: In the case in which alleged fugitives from justice have been returned when charged with conspiracy in a demanding State, it is proved that the alleged fugitive was within that State at or about the time of some overt act, and under such circumstances that it may be presumed that the defendant took a part in the conspiracy.

In the Meeker case, to which Mr. Johnstone referred before
125 recess, it appeared that at the time Meeker was within the State of Texas he was in the company of one of the people with whom he was jointly indicted for the fraud. The Appellate Division itself in that case points out the distinction on which I rely, and that is, that the circumstances under which the accused is in the demanding State must be such that it can be inferred reasonably that he was engaged in the conspiracy or in some act pursuant to it. In its opinion the Appellate Division, speaking by Mr. Justice Dowling, makes that point. Now, the evidence in this case does not go that far at all. It merely shows one visit—I will consider one at the present time—for social purposes to a place entirely disconnected from the scene of this crime, and therefore a very short sojourn under circumstances which negative the participation of the relator in any conspiracy or act in furtherance of it. That point was also made by Mr. Justice Hughes in the opinion he rendered in the Hoffstot case. It is also made in the opinion of Gov. Fort to which I alluded.

A good deal of stress was laid by Mr. Johnstone in his argument on a certain check dated the 9th of June. It was for the very purpose of meeting an argument such as that that I wished to obtain the evidence of this man Carberry who is ill and could not come here. It is not in my view of the case an important point, but if stress is going to be laid on it I wish to meet it.

I wish to call your Honor's attention again to the papers upon which the requisition to the Governor of the State of New York was rendered. You will see in the requisition there is no
126 statement that the relator was within the State at the time this crime or these crimes were committed. You will see by the affidavit of Charles N. Apple that the relator was not there at the time the crime was committed. In view of that fact, I think it perhaps conclusive that no contention was made by the State of New Jersey that the relator was physically within the State.

The Court: If the last count in the indictment counts for anything, the relator certainly was within the State at the time of the alleged commission of the crime; that is, if the last count of the

indictment amounts to anything, and for all purposes it must in this proceeding.

Mr. Patterson: Well, I can only refer your Honor again to the opinion of Governor Fort.

The Court: I know, you have made your argument and that is my opinion.

Mr. Patterson: Your Honor, there is one matter I would like to get on the record before we close, and that is the date of the arrest of Charles Stewart.

The Court: As you wish.

Mr. Patterson: This information Mr. Brown could give us, and I ask Mr. Brown to state it for the record.

Mr. Johnstone: Call him as a witness so that the question can be objected to. We don't think that it is material. We raise no objection to his reopening the case if he thinks it is important evidence that he has omitted.

127 WILLIAM ELMER BROWN, JR., sworn on behalf of the relator, testified as follows:

Direct examination.

By Mr. Patterson:

Q. Mr. Brown, are you one of the prosecuting officers of the County of Atlantic?

A. I am.

Q. Will you tell me the date when Charles Stewart, mentioned in the indictment affixed to the requisition papers in this case was arrested?

Mr. Johnstone: That is objected to as immaterial and irrelevant.

The Court: I don't see the relevancy of that.

Mr. Patterson: It limits the period, if your Honor please, during which these crimes were committed.

The Court: Let it go in for what it is worth.

A. I think it was on July 21st, 1913.

Q. Was he arrested for the crimes alleged to have been committed under this indictment?

A. He was.

Mr. Patterson: Now, if your Honor please, I wish to have some disposition made in reference to my taking of the testimony of this man Carberry.

The Court: Is it necessary?

Mr. Patterson: Mr. Johnstone has argued that it was or at least he made an argument on it.

The Court: It is merely cumulative of the testimony you already have.

Mr. Patterson: This relates to and shows the relator here in the morning of a certain day that it was charged that he was in New

Jersey and when Mr. Johnstone in his argument inferred that he was in New Jersey.

128 The Court: What do you say to the application for an adjournment, Mr. Johnstone?

Mr. Johnstone: So far as I am concerned, it don't incommode me, but the Jersey people are here. I don't like to keep the Prosecutor.

The Court: It disarranges the procedure of this Court. I am only here one week. Saturday is my last day. I leave here at 12 o'clock.

Mr. Patterson: Can we take the deposition and submit it to your Honor?

The Court: Of what use is it? I am clearly of the opinion on the evidence as it now stands this relator ought to be held, because it appears affirmatively from his own proof that he was within the State at or about the time when the crimes charged in the indictment were committed.

Mr. Patterson: Will your Honor allow me to make an offer of proof.

The Court: If the other side don't object to it, but I guess they will.

Mr. Johnstone: I shall object. I don't care to allow a thing like that to pass without having the witness here for cross examination. You know it is an old question and it is easy enough to make a statement about it, and say that a certain witness will testify so and so, but that witness has not been cross examined, and after a cross examination it often does not appear that way at all.

Mr. Patterson: Your Honor is going to decide it upon another point.

129 The Court: What is that?

Mr. Patterson: Upon the point that he is covered by this blanket indictment.

The Court: That is what I think he is.

Mr. Patterson: I would like to have it appear on the record that this is so, so that when I take an appeal and get my record that I will have something covering this 9th of June.

The Court: You hold that particular view, Mr. Johnstone. That is clearly my view. Have you any objection of his making that offer?

Mr. Johnstone: I have no objection to your Honor saying on the record any opinion your Honor thinks covers this case.

The Court: Will you take heed to the other side's suggestion?

Mr. Johnstone: I want to say this: I don't want to be put in a position of even impliedly conceding that he was not in the State of New Jersey on the 9th of June, because there is testimony adduced here that proves to my mind that he was there on that day.

Mr. Patterson: It is for that reason that I wished to adduce further testimony here before we made our argument.

The Court: When do you expect to have such a witness here?

Mr. Patterson: I would not be able to get him here in Court; I would have to go over with some representative from the other

side, and take testimony while he is in bed. I do not know of any provision which permits the taking of depositions like this.

130 The Court: You maintain, Mr. Johnstone, as the Court has ruled, that the last indictment covers all the period from the first of January, 1913, to the date of the indictment; and that upon at least three occasions during that period, the relator, by his own admissions, was within the State of New Jersey.

Mr. Johnstone: I made my main argument upon that proposition, and I was also, I think, entitled to rely, your Honor, upon the presumption created by the Governor's warrant, which would raise a presumption that he was within the State upon the other dates.

The Court: That is another argument. What counsel wishes to do is he wants to know whether it is necessary for him to call witnesses to prove that he was not within the State of New Jersey on the 9th of June, 1913, that is what he wishes to know, so that he may not be met upon an appeal with the statement that there was no proof that the relator was not within the State of New Jersey on the 9th of June, 1913.

Mr. Johnstone: Your Honor, we have agreed between us that it may be put upon the record that if this witness Carberry were called, he would testify—that is, we are not stating it as a fact, but we will concede that he would testify that he saw Mr. Ireland in the State of New York some time in the morning, the hour not mentioned, of June 9th, 1913; that he saw him upon that occasion at the Erie Terminal; and that he gave Mr. Ireland \$40 in cash, and that that occurrence took place some time in the morning
131 of June 9th, the hour not specified.

Mr. Patterson: I would like to recall for a moment Mr. Prior. I have discovered since he was on the stand that there was a further date.

LAURENCE R. PRIOR, recalled, by the relator.

Direct examination.

By Mr. Patterson:

Q. Mr. Prior, did you see Mr. Ireland in June, on any other occasion than that to which you testified this morning?

A. Yes, on the 5th and 9th.

Q. Where was he on the 9th of June when you saw him?

A. At the Western Union Building.

Q. You recollect—the Western Union Building of New York?

A. Yes.

Q. Do you recollect what time it was that you saw him, what time of day?

A. About half-past twelve, between half-past twelve and one.

Cross-examination.

By Mr. Johnstone:

Q. Mr. Prior, you came here today, this morning, armed with a note book which you already had marked with papers between the leaves?

A. I did.

Q. You were asked then to tell the dates in June upon which you saw Mr. Ireland?

A. That is right.

Q. Before coming here, you had looked over your notes and memorandum expecting to be interrogated about these specific subjects, didn't you?

A. I had.

Q. And you were all prepared for it?

A. Yes.

Q. And had it all ready?

A. Yes.

Q. And ready to give it on the tip of your tongue?

A. Yes, sir.

132 Q. The whole thing?

A. Yes, sir.

Q. Did you say one word this morning about having seen him on June 9th after all this previous preparation?

A. No, I didn't.

Q. At any time?

A. No, sir.

Q. But in the meantime you have been talking to somebody, haven't you?

A. Yes.

Q. And somebody impressed upon you that it might be important to have seen him in New York on the 9th of June?

A. Yes.

Q. And then you came back here after recess and you are asked did you see him in June, and your answer is yes; and you say, "I saw him on the 5th and 9th," and you said nothing about those two days this morning, did you?

A. No.

Q. Not a word?

A. No.

Q. Although you had prepared for the ordeal before hand?

A. Yes.

Q. You know where he went after he left you on the morning of June 9th?

A. No, I don't know where he went.

Q. What day of the week was it?

A. I don't know the date.

Redirect examination.

By Mr. Patterson:

Q. Mr. Pryor, when you were testifying this morning, you were testifying from memorandums?

A. Yes.

Q. Did you turn over the pages and look to see other dates?

Mr. Johnstone: Wait a moment; I object. It is immaterial.

The Court: Did you do what?

Mr. Patterson: Did he turn over the pages to look at the dates.

The Court: I will allow the question whether he turned them over.

A. No, I didn't.

133 Q. Were you testifying from recollection?

A. At that time, yes.

Q. You have since refreshed your memory by turning over the pages?

A. Yes, sir.

Recross-examination.

By Mr. Johnstone:

Q. Didn't you have the book in your hand this morning with every page marked with a slip of paper stuck in it?

A. Yes.

Q. Didn't you refresh your memory from that memorandum and go over this previously before you went on the witness stand?

A. I did.

Q. Do you mean to tell us you walked up to that chair and sat down on that chair with a book in your hand, the pages all marked, before you got there?

A. There was slips in the book.

Q. Were the slips put in there to mark dates?

A. No, no.

Q. Don't you know that those slips were put in there to mark the dates concerning which you were going to testify?

A. The particular dates I was going to testify to, yes.

Q. Were the slips put in there to mark the dates in the month of June with regard to which you were going to testify to Mr. Ireland's presence in New York?

— A. Those particular dates; yes.

Q. And you had those slips all in?

A. Yes, sir.

Q. Before you went on the witness stand?

A. Yes.

Q. Had you saw—you had looked the matter up to find out what dates in June you saw him and you marked those dates with slips of paper, had you not?

A. Yes.

Q. Testimony as to those particular days that you were to give?

A. Yes.

Q. You marked the dates in June?

A. Those particular dates, the 10th, 11th, 12th and 13th.

134 Q. Were you told to look at these particular dates before you went on the stand?

A. I was asked if I seen him on those dates.

Q. Were you told by anybody to remember any particular day of the month before you went to the witness stand?

A. Yes.

Q. Were not you told to remember the days you saw him in the month of June?

A. Those particular days.

Q. Were you told to remember the days you saw him in the month of June?

A. No.

Q. Was not the first question asked of you when you were on the stand: What days did you see him in June?

A. What day did I see him in June—yes.

Q. You were not asked regarding specific dates, you were asked generally, weren't you, what days in June did you see him?

A. Yes, sir.

Q. You had those dates all marked, didn't you?

A. Those dates were marked.

By Mr. Patterson:

Q. Did you have the 9th of June marked by any slip?

A. No, I didn't have those marked.

Mr. Patterson: That is our case, if your Honor please.

The Court: What do you do Mr. Johnstone?

Mr. Johnstone: We rest our case.

The Court: Do you make a motion?

Mr. Johnstone: I move now that the writ of habeas corpus be dismissed and that the prisoner be remanded to the custody of the Police Commissioner with a direction to the Police Commissioner to deliver him to the agent of the State of New Jersey authorized by the Governor's warrant to receive him.

The Court: I grant the motion.

The foregoing contains all the evidence given upon the trial in this proceeding.

135

State of New Jersey.

Executive Department.

The Governor of the State of New Jersey to the Governor of the State of New York:

Whereas: It appears by the papers required by the Statutes of the United States, which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the Laws of this State, that J. D: Ireland stands charged with the crime of conspiracy committed in the County of Atlantic in this State, and it having been represented to me that he has fled from the justice of this State and has taken refuge within the State of New York,

Now therefore pursuant to the provisions of the Constitution and Laws of the United States in such case made and provided, I do hereby request that the said J. D. Ireland be apprehended and delivered to Charles N. Apple who is hereby authorized to receive and convey him to the State of New Jersey there to be dealt with according to law.

In Testimony Whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed at Trenton, this Tenth day of June in the year of our Lord, one thousand nine hundred and fourteen.

By the Governor:

JOHN W. SLOCUM,
President of the Senate, Acting Governor.
DAVID S. CRALLI,
Secretary of State.

[SEAL.]

136 STATE OF NEW JERSEY,
County of Atlantic, ss:

June 9th, A. D. 1914.

To His Excellency the Governor:

SIR: I have the honor to request that you issue a requisition upon the Governor of the State of New York for the extradition of J. D. Ireland who stands charged by indictment together with one Stewart with the crime of conspiracy committed in the County of Atlantic on the twelfth day of July A. D. 1913, and who, to avoid prosecution has kept himself without the jurisdiction of this State and is now a fugitive from justice, and, as I am informed, in the City of New York of said State of New York.

I hereby certify that, in my opinion, the ends of public justice require that the alleged criminal be brought to this State for trial at the public expense, and that I am willing such expense shall be a charge on the county in which the crime was committed, to wit, the County of Atlantic.

I hereby certify that I have examined into the facts, and verily believe that is sufficient evidence to secure a conviction of the said fugitive.

I designate and recommend Charles N. Apple a public officer, viz., detective in the Police Department of the City of Atlantic City, County of Atlantic, and State of New Jersey, as a proper person to be appointed agent of the State, and certify that he has no personal interest in the arrest and return of the fugitive other than that of a proper performance of official duty.

I am not aware of, and verily believe there never has been, any former application for a requisition for the same person, for the same offense which is the basis of this application.

137 I am not aware and verily believe the said fugitive is not now under either civil or criminal arrest other than to await extradition.

I further certify, that the requisition for his extradition is made in good faith, with the sole intent to prosecute him for said crime, and not to secure his return to this State to afford opportunity to serve him with civil process, nor for any other purpose.

And I further certify, that all papers in duplicate have been compared with each other, and are in all respects exact counterparts.

And I further certify, that the offence charged against the said fugitive is a misdemeanor and that said offence and punishment therefor is defined in Compiled Statutes of New Jersey, Vol. 2, page 1757, Sec. 37; P. L. 1898, p. 805, amended P. L. 1899, p. 214.

Application for the arrest and return of the said fugitive has not been sooner made because of inability to locate.

Very Respectfully,
(Signed)

C. S. MOORE,
Prosecutor of the Pleas for Atlantic County.

138 In the Atlantic County Court of Oyer and Terminer, January Term, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

ATLANTIC COUNTY, *To wit:*

The grand inquest, of the State of New Jersey, and for the body of the County of Atlantic, upon their respective oath and affirmation, those who affirmed having first alleged themselves to be conscientiously scrupulous against taking an oath.

Present, That Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood and J. D. Ireland, late of the City of Atlantic City in the County of Atlantic and State of New Jersey, on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, at the City of Atlantic City, in the County of Atlantic aforesaid, and within the jurisdiction of this Court, being persons of evil minds and dispositions, and unlawfully and wickedly intending and devising to cheat and defraud Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, of certain of their moneys then and there falsely and fraudulently, did combine, unite, confederate and conspire and bind themselves by oath, covenant and agreement, to obtain and get into their hands and possession of and from the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, certain of their moneys, and then to abscond out of the State of New Jersey and defraud them thereof, and

139 the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood and J. D. Ireland, in pursuance and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, did then and there falsely and fraudulently obtain and get into their hands and possession of and from said Harry B. Cook, Howell E. Cook and B.

Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, a certain sum of money, to wit, the sum of one hundred dollars, lawful money of the United States of America, upon a certain check dated Little Falls, N. J., July 12th, 1913, payable to the order of Charles Stuart in the sum of one hundred dollars, drawn on the Little Falls National Bank, and signed by said J. D. Ireland, which said check was placed in the hands of said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, by said J. D. Ireland together with a certain letter of credit bearing the name of Charles Stuart and obtained by said J. D. Ireland, for use in connection with said check; and in further pursuance and according to said conspiracy, combination, confederacy and agreement amongst them, he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, being in possession of said check and letter of credit aforesaid, did unlawfully and corruptly on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, present said check to the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, to be cashed and in connection therewith, he, the said Charles

140 Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did produce said letter of credit and offer the same to said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, as a means of identification; and in further pursuance of and according to said conspiracy, combination, confederacy and agreement amongst them, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did unlawfully, and corruptly receive by means of said check and letter of credit the sum of one hundred dollars, lawful money of the United States from the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, to the great damage of the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons; whereas in truth and in fact the said paper writing was not then and there a good and genuine check and order for the payment of said sum of one hundred dollars, nor for the payment of any sum of money whatever, nor was the said letter of credit at the time of presentation to said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, a good and genuine letter of credit, as they the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, there and then well knew, to the evil example of all others in like case offending, contrary to the form of the

141 statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the grand inquest aforesaid, upon their respective oath and affirmation aforesaid, do further

Present, that said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, late of the City of Atlantic City, in the County of Atlantic, and state of New Jersey, on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, at the City of Atlantic City, in the County of Atlantic, aforesaid, and within the jurisdiction of this Court, being persons of evil minds and dispositions, and unlawfully and wickedly intending and devising to cheat and defraud Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott, of certain of their moneys then and there falsely and fraudulently, did combine, unite, confederate and conspire and bind themselves by oath, covenant and agreement, to obtain and get into their hands and possession of and from the said Henry W. Leeds, and J. Haines Lippincott, trading and doing business under the firm name of Leeds & Lippincott, certain of their moneys and then to abscond out of the State of New Jersey and defraud them thereof and the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood and J. D. Ireland, in pursuance and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had on the twelfth day of July in

the year of our Lord one thousand nine hundred and thirteen, did then and there falsely and fraudulently obtain and get into their hands and possession of and from said Henry W. Leeds, and J. Haines Lippincott, trading and doing business under the firm name of Leeds & Lippincott, a certain sum of money, to wit, the sum of one hundred dollars, lawful money of the United States of America, upon a certain check dated, Little Falls, N. J., July 12th, 1913, payable to the order of F. F. Verline, in the sum of one hundred dollars, drawn on the Little Falls National Bank, and signed by said J. D. Ireland, which said check was placed in the hands of said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, by said J. D. Ireland, together with a certain letter of credit bearing the name of F. F. Verline, and obtained by said J. D. Ireland for use in connection with said check; and in further pursuance and according to said conspiracy, combination, confederacy, and agreement amongst them, he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, being in possession of said check and letter of credit aforesaid, did unlawfully and corruptly on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, present said check to the said Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds & Lippincott, to be cashed and in connection therewith he, the said Charles Stewart, alias F. F. Verline, alias William Wood, did produce said letter of credit and offer the same to said Henry W. Leeds and J. Haines Lippincott,

trading and doing business under the firm name of Leeds & Lippincott, as a means of identification; and in further pursuance of and according to said conspiracy, combination, confederacy and agreement, amongst them, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did unlawfully and corruptly receive by means of said check and letter of credit the sum of one hundred dollars, lawful money of the United States from the said Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott, to the great damage of the said Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott, whereas in truth and in fact, the said paper writing was not then and there a good and genuine check and order for the payment of said sum of one hundred dollars, nor for the payment of any sum of money whatever, nor was the said letter of credit at the time of presentation to said Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott, a good and genuine letter of credit, as they the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland there and then well knew, to the evil example of all other- in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

And the grand inquest aforesaid, upon their respective oath and affirmation aforesaid, do further

Present, that said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, late of the City of Atlantic City, in the County of Atlantic and State of New Jersey, on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, at the City of Atlantic City, in the County of Atlantic aforesaid, and within the jurisdiction of this Court, being persons of evil minds and dispositions and unlawfully and wickedly intending and devising to cheat and defraud, "The Shelburne, Incorporated," a corporation of the State of New Jersey, of certain of its moneys then and there falsely and fraudulently, did combine, unite, confederate and conspire and bind themselves by oath, covenant and agreement, to obtain and get into their hands and possession of and from "The Shelburne, Incorporated," a corporation of the State of New Jersey, certain of its money, and then to abscond out of the State of New Jersey, and defraud it thereof and the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, in pursuance and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, did then and there falsely and fraudulently obtain and get into their hands and possession of and from said "The Shelburne, Incorporated," a corporation of the State of New Jersey,

a certain sum of money, to wit, the sum of one hundred dollars, lawful money of the United States of America, upon a certain check dated, Little Falls, N. J., July 12th, 1913, payable to the order of Robert A. Smith, in the sum of one hundred dollars, drawn on the

145 Little Falls National Bank, and signed by said J. D. Ireland, which said check was placed in the hands of said Charles Stewart, alias F. F. Verline, alias Robert A. Smith, alias Charles Stuart, alias Walter Duffy, alias William Wood, by said J. D. Ireland, together with a certain letter of credit bearing the name of Robert A. Smith, and obtained by said J. D. Ireland, for use in connection with said check; and in further pursuance and according to said conspiracy, combination, confederacy and agreement amongst them, he the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, being in possession of said check and letter of credit aforesaid, did unlawfully and corruptly on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, present said check to said "The Shelburne, Incorporated," a corporation of the State of New Jersey, to be cashed and in connection therewith, he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did produce said letter of credit and offer the same to said "The Shelburne, Incorporated," a corporation of the State of New Jersey, as a means of identification; and in further pursuance of and according to said conspiracy, combination, confederacy and agreement amongst them, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did unlawfully and corruptly receive by means of said check and letter of credit the sum of one hundred dollars, lawful money of the United States from the said "The Shelburne, Incorporated," a corporation of the State of New Jersey, whereas in truth and in fact,

146 the said paper writing was not then and there a good and genuine check, and order for the payment of said sum of one hundred dollars, nor for the payment of any sum of money whatever, nor was the said letter of credit at the time of presentation to said "The Shelburne, Incorporated," a corporation of the State of New Jersey, a good and genuine letter of credit, as they, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Woods, and J. D. Ireland, there and then well knew, to the evil example of all others in like case offending contrary to the form of the statute in such case made and provided, and against the peace of this State, the Government and dignity of the same.

And the grand inquest aforesaid, upon their respective oath and affirmation aforesaid, do further

Present, that said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, — William Wood, and J. D. Ireland, late of the City of Atlantic City, in the County of Atlantic and State of New Jersey, on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, at the City of Atlantic City, in the County of Atlantic, aforesaid, and

within the jurisdiction of this Court, being persons of evil minds and dispositions and unlawfully and wickedly intending and devising to cheat and defraud the "Traymore Hotel Company," a corporation of the State of New Jersey, of certain of its moneys then and there falsely and fraudulently did combine, unite, confederate and conspire and bind themselves by oath, covenant and agreement, to obtain and get into their hands and possession of and from the said "Traymore Hotel Company," a corporation of the State of New Jersey, certain of its moneys, and then to abscond out of the

147 State of New Jersey and defraud it thereof and the said

Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, in pursuance and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, did then and there falsely and fraudulently obtain and get into their hands and possession of and from the "Traymore Hotel Company," a corporation of the State of New Jersey, a certain sum of money, to wit, the sum of one hundred dollars, lawful money of the United States of America, upon a certain check dated Little Falls, N. J., July 12th, 1913, payable to the order of Walter Duffy, in the sum of one hundred dollars, drawn on the Little Falls National Bank, and signed by said J. D. Ireland, which said check was placed in the hands of said Charles Stewart, alias F. F. Verline, alias Robert A. Smith, alias Charles Stuart, alias Walter Duffy, alias William Wood, by said J. D. Ireland, together with a certain letter of credit bearing the name of Walter Duffy, and obtained by said J. D. Ireland for use in connection with said check; and in further pursuance and according to said conspiracy, combination, confederacy and agreement, amongst them, he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, being in possession of said check and letter of credit aforesaid, did unlawfully and corruptly on the twelfth day of July, in the year of our Lord one thousand nine hundred and thirteen, present said check to the said "Traymore Hotel Company," a corporation of the State of New Jersey, to be cashed and in connection therewith, he, the said

148 Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did produce said letter of credit and offer the same to said "Traymore Hotel Company," a corporation of the State of New Jersey, as a means of identification and in further pursuance of and according to said conspiracy, combination, confederacy and agreement amongst them, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did unlawfully, and corruptly receive by means of said check and letter of credit the sum of one hundred dollars, lawful money of the United States from the said "Traymore Hotel Company," a corporation of the State of New Jersey, to the great damage of the said "Traymore Hotel Company," a corporation of the State of New Jersey, whereas in truth and in fact, the said paper writing

was not then and there a good and genuine check and order for the payment of said sum of one hundred dollars, nor for the payment of any sum of money whatever, nor was the said letter of credit at the time of presentation to said "Traymore Hotel Company," a corporation of the State of New Jersey, a good and genuine letter of credit, as they, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland there and then well knew, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the grand inquest aforesaid, upon their respective oath and affirmation aforesaid, do further

Present, that said Charles Stewart, alias F. F. Verline, alias
 149 Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland late of the City of Atlantic City, in the County of Atlantic and State of New Jersey, on the ninth day of June, in the year of our Lord one thousand nine hundred and thirteen, at the City of Atlantic City, in the County of Atlantic, aforesaid, and within the jurisdiction of this Court, being persons of evil minds and dispositions, and unlawfully and wickedly intending and devising to cheat and defraud one Walter J. Buzby, of certain of his moneys then and there falsely and fraudulently, did combine, unite, confederate and conspire and bind themselves by oath, covenant and agreements, to obtain and get into their hands and possession of and from the said Walter J. Buzby, certain of his moneys, and then to abscond out of the State of New Jersey and defraud him thereof, and the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, in pursuance and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had on the ninth day of June, in the year of our Lord one thousand nine hundred and thirteen, did then and there falsely and fraudulently obtain and get into their hands and possession of and from said Walter J. Buzby, a certain sum of money, to wit, the sum of one hundred dollars, lawful money of the United States of America, upon a certain check dated, Little Falls, N. J., June 9th, 1913, payable to the order of William Wood, in the sum of one hundred dollars, drawn on the Little Falls National Bank, and signed by said J. D. Ireland, which said check was placed in the hands of said Charles Stewart, alias F. F. Verline, alias Robert A. Smith, alias

Charles Stuart, alias Walter Duffy, alias William Wood, by
 150 said J. D. Ireland, together with a certain letter of credit bearing the name of William Wood, and obtained by said J. D. Ireland, for use in connection with said check; and in further pursuance and according to said conspiracy, combination, confederacy and agreement amongst them, he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, being in possession of said check and letter of credit aforesaid, did unlawfully and corruptly on the ninth day of June, in the year, of our Lord one thousand nine hundred

and thirteen, present said check to the said Walter Buzby, to be cashed and in connection therewith he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did produce said letter of credit and offer the same to said Walter J. Buzby, as a means of identification; and in further pursuance of and according to said conspiracy, combination, confederacy and agreement amongst them, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did unlawfully and corruptly receive by means of said check and letter of credit the sum of one hundred dollars, lawful money of the United States from the said Walter J. Buzby, to the great damage of the said Walter J. Buzby, whereas in truth and in fact, the said paper writing was not then and there a good and genuine check and order for the payment of said sum of one hundred dollars, nor for the payment of any sum of money whatever, nor was the said letter of credit at the time of presentation to said Walter J. Buzby a good and genuine letter of credit, as they, the said Charles Stewart, alias F. F. Verline, 151 alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland there and then well knew, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid, upon their respective oath and affirmation, aforesaid, do further

Present, that said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood and J. D. Ireland, late of the City of Atlantic City, in the County of Atlantic and State of New Jersey, on or about the first day of January, in the year of our Lord one thousand nine hundred and thirteen, and on divers other days between that day and the day of the taking of the Inquisition, at the City of Atlantic City, in the County and State aforesaid, and within the jurisdiction of this Court, being persons of evil minds and dispositions, and unlawfully and wickedly intending and devising to cheat and defraud Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons; Henry W. Leeds, and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey, and Walter J. Buzby, and divers other persons whose names are to this Grand Inquest unknown of certain of their moneys, then and there did 152 falsely and fraudulently conspire, combine, confederate, unite and bind themselves by oath, covenant, and agreement, to obtain and get into, their hands and possession of and from said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons; Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott; "The Shelburne, In-

incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey, and Walter J. Buzby, and divers other persons whose names are to this Grand Inquest unknown, certain of their moneys of great value and then to abscond out of the State of New Jersey and defraud them thereof and the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland in pursuance and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had on the first day of January, in the year of our Lord, one thousand nine hundred and thirteen and on divers other days between that day and the day of the taking of this inquisition, did then and there falsely and fraudulently obtain, and get into their hands and possession of and from said Harry B. Cook, Howell E. Cook, and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, Harry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Company," a corporation of the State of New Jersey, and Walter J. Buzby, and divers other persons whose names are to this Grand Inquest as yet unknown, divers sums of money of great value, the exact amount being to

153 this Grand Inquest as yet unknown, upon certain checks each drawn on the Little Falls National Bank, Little Falls, New Jersey, and each check made payable to different persons and signed by said J. D. Ireland, which said checks were placed in the hands of said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, by said J. D. Ireland, together with certain letters of credit bearing names corresponding to the names on the aforesaid check and obtained by said J. D. Ireland for use in connection with said checks; and in further pursuance and according to said conspiracy, combination, confederacy and agreement amongst them, he, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, being in possession of said checks and letters of credit aforesaid, did unlawfully and corruptly on the first day of January, in the year of our Lord, one thousand nine hundred and thirteen, and on divers other days between that day and the day of the taking of this Inquisition, present said checks to the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey, and Walter J. Buzby, and divers other persons whose names are to this Grand Inquest as yet unknown, to be cashed and in connection therewith, he, the said Charles Stewart, alias F. F. Verline, 154 alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did produce said letter of credit and offer the same to said Harry B. Cook, Howell E. Cook, B. Har-

rison Cook, trading under the firm name of F. P. Cook Sons; Henry W. Leeds and J. Haines Lippincott, trading under the firm name of Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey, and Walter J. Buzby, and divers other persons whose names are to this Grand Inquest as yet unknown as a means of identification; and in further pursuance of, and according to said conspiracy, combination, confederacy and agreement amongst them, the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, did unlawfully and corruptly receive by means of said checks and letters of credit divers sums of money of great value, the exact amount being to this Grand Inquest as yet unknown, from the said Harry B. Cook, Howell E. Cook, B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons; Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey, and Walter J. Buzby, and divers other persons, whose names are to this Grand Inquest as yet unknown, to the great damage of the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons, Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of

155 Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey, and Walter J. Buzby and divers other persons whose names are to this Grand Inquest as yet unknown; whereas in truth and in fact, the said paper writing was not then and there a good and genuine check and order for the payment of said sum appearing on the face thereof, nor for the payment of any sum of money whatever, nor was the said letters of credit at the time of presentation to the said Harry B. Cook, Howell E. Cook and B. Harrison Cook, trading and doing business under the firm name of F. P. Cook Sons; Henry W. Leeds and J. Haines Lippincott, trading and doing business under the firm name of Leeds and Lippincott; "The Shelburne, Incorporated," a corporation of the State of New Jersey; "The Traymore Hotel Company," a corporation of the State of New Jersey and Walter J. Buzby, and divers other persons whose names are to this Grand Inquest as yet unknown, good and genuine letters of credit, as they the said Charles Stewart, alias F. F. Verline, alias Charles Stuart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, and J. D. Ireland, then and there well knew, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

CHARLES S. MOORE,
Prosecutor of the Pleas.
 B.

156 STATE OF NEW JERSEY,
County of Atlantic, ss:

I, Edwin A. Parker, Clerk of the County of Atlantic, and also Clerk of the Court of Oyer and Terminer, holden therein, the same being a court of record, do hereby certify that the foregoing is a full, true and correct copy of a certain indictment for conspiracy—The State v. Charles Stewart, alias F. F. Verline, etc., as the same is filed in my said office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this eighth day of June, A. D. one thousand nine hundred and fourteen (1914).

[SEAL.]

EDWIN A. PARKER, *Clerk*.

I, C. L. Cole, one of the Judges of the Court of Oyer and Terminer, holden in and for said County of Atlantic, do hereby certify that Edwin A. Parker, Esquire, whose name is subscribed to the preceding attestation, is the Clerk of the said County of Atlantic, and also Clerk of the Court of Oyer and Terminer, holden in and for said County, duly elected and sworn, and that full faith and credit are due to his official acts; I further certify that the seal affixed to the said attestation is the seal of our said Court of Oyer and Terminer and that the attestation thereof is in due form.

Witness, my hand at May's Landing, this eighth day of June, A. D., one thousand nine hundred and fourteen (1914).

C. L. COLE, *Judge*.

157 STATE OF NEW JERSEY,
Atlantic County, ss:

I, Edwin A. Parker, Clerk of the County of Atlantic and also Clerk of the Court of Oyer and Terminer holden therein, do hereby certify that Honorable C. L. Cole, whose name is subscribed to the preceding certificate, is one of the Judges of the Court of Oyer and Terminer, holden in and for said County of Atlantic, duly commissioned and sworn and that the signature of said Judge to said certificate is genuine.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court and County this eighth day of June, A. D. one thousand nine hundred and fourteen (1914).

[SEAL.]

EDWIN A. PARKER, *Clerk*.

STATE OF NEW JERSEY,
County of Atlantic, ss:

Charles N. Apple, of full age, being duly sworn according to law, upon his oath deposes and says, that he is an officer and detective

in the Police Department of the City of Atlantic City, in the County of Atlantic, State of New Jersey; that he knows J. D. Ireland who together with one Charles Stewart stands charged by indictment with having committed the crime of conspiracy in said county, on the twelfth day of July, nineteen hundred and thirteen; that while the said J. D. Ireland on the said twelfth day of July, nineteen hundred and thirteen was not personally present in the place where said crime is alleged to have been committed in the said County of At-

lantic, his co-conspirator the said Charles Stewart was personally present at said place and carried out by performance

the said conspiracy that had been previously arranged and entered into between the said Ireland and the said Stewart which said conspiracy was to be consummated in said place in Atlantic County; that since the commission of said crime the said Ireland has kept himself without the State of New Jersey and is now in the State of New York in the custody of the Police authorities of the City of New York; that his knowledge of the whereabouts of the said J. D. Ireland is obtained by being personally present when said J. D. Ireland was arrested to await extradition.

CHARLES N. APPLE.

Sealed and Subscribed to before me this ninth day of June, A. D. nineteen hundred and fourteen.

[SEAL.]

ROSE BEYER,
Notary Public, New Jersey.

Commission expires — —, —.

159 STATE OF NEW YORK,
Albany County, ss:

Irene E. McKenna, being duly sworn deposes and says that she is a stenographer employed in the Executive Chamber at Albany, N. Y., and that she has copied and compared the foregoing requisition in the case of J. D. Ireland, and that the same is a true copy of the original requisition papers on file in the Executive Chamber, and of the whole thereof.

IRENE E. McKENNA.

Sworn to before me this 3rd day of July, 1914.

[SEAL.]

GEO. R. HITCHCOCK,
Notary Public, Saratoga County.

Certificate filed in Albany County.

160

RESPONDENT'S EXHIBIT 1.

No. 5612.

Little Falls, N. J.,

July 14, 1913.

Little Falls National Bank,

Little Falls, New Jersey.

Pay to the order of Chas. Stuart One Hundred 00/100 Dollars
\$100/00.

J. D. IRELAND.

RESPONDENT'S EXHIBIT 2.

No. 6027.

Little Falls, N. J.,

June 9, 1913.

Little Falls National Bank,

Little Falls, New Jersey.

Pay to the order of William Wood One Hundred 00/100 Dollars
\$100/00.

J. D. IRELAND.

161

Stipulation Settling Case.

It is hereby stipulated by the attorneys for the respective parties herein that the foregoing case contains all the evidence given in this proceeding and that the same is hereby settled and it is hereby consented that the same be ordered to be filed.

Dated, June —, 1916.

HENRY GOLDSTEIN,
Attorney for Plaintiff-appellant.

EDWARD SWANN,
District Attorney, N. Y. County,
Attorney for Defendant-respondent.

Order Settling Case.

Pursuant to the foregoing stipulation the foregoing case and exceptions on appeal are hereby settled, signed and certified by me and ordered to be filed as the true and correct case and exceptions on appeal herein.

Dated, June —, 1916.

LEONARD A. GIEGERICH, *J. S. C.*

162

Waiver of Certification.

It is hereby stipulated that the foregoing are correct copies of the notice of appeal, the order appealed from, the writ of habeas corpus and petition therefor, return, traverse, and the case and exceptions as settled and of the whole thereof, on file in the office of the Clerk of the County of New York, and that certification thereof pursuant to Sections 1353 and 3301 of the Code of Civil Procedure or otherwise is hereby waived.

Dated, June 5th, 1916.

HENRY GOLDSTEIN,
Attorney for Plaintiff-appellant.

EDWARD SWANN,
District Attorney, N. Y. County,
Attorney for Defendant-respondent.

Affidavit of No Opinion.

STATE OF NEW YORK,
County of New York, ss:

Arthur C. Patterson, being duly sworn, deposes and says that he is an attorney at law, and was of counsel for the relator in this proceeding and was present at the trial of the issues herein before Mr. Justice Giegerich. That no opinion was rendered by Mr. Justice Giegerich upon granting the order appealed from herein.

ALBERT C. PATTERSON.

Sworn to before me this 5th day of June, 1916.

RUDOLPH A. TRAVERS,
Notary Public, Bronx Co.

Cert. filed in N. Y. Co.

163 *Order of Appellate Division Affirming Order Dismissing Writ.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department in the County of New York on the 9th Day of March, 1917.

Present:

Hon. John Proctor Clarke, Presiding Justice.
" Francis M. Scott,
" Alfred R. Page,
" Vernon M. Davis,
" Clarence J. Shearn,
Justices.

The People of the State of New York ex Rel. JOHN D. IRELAND,
Relator-Appellant,
against
ARTHUR WOODS, Police Commissioner of the City of New York,
Respondent.

An appeal having been taken to this Court by the relator from an order of the Supreme Court entered on the 10th day of July, 1914, dismissing a writ of habeas corpus, and directing that the relator be delivered to the agent of the State of New Jersey authorized by the rendition warrant of the Governor of this State to receive him; and the said appeal having been argued by Mr. George W. Wickersham, of counsel for the appellant, and by Mr. 164 Robert S. Johnstone, of counsel for the respondent; and due deliberation having been had thereon, it is hereby

Unanimously ordered that the order so appealed from be and the same is hereby affirmed, and that the stay of proceedings be vacated and set aside, and that the said order of the Supreme Court be enforced and carried into execution and effect.

Enter,

J. P. C.,
J. S. C.

Notice of Appeal to the Court of Appeals.

Index No. 18495; Year, 1914.

Supreme Court of the State of New York, Appellate Division, First Department.

The People of the State of New York on the Relation of JOHN D. IRELAND, Plaintiff-Appellant,
against

ARTHUR WOODS, as Police Commissioner of the City of New York,
Defendant-Respondent.

Please take notice, that the relator herein, John D. Ireland, hereby appeals to the Court of Appeals of the State of New York, from the final order herein of the Appellate Division of the Supreme 165 Court, First Department, entered and filed in the office of the Clerk of said Appellate Division on the 13th day of March, 1917, a certified copy of which order was filed in the office of the Clerk of the County of New York on the 15th day of March, 1917, which said order affirmed an order entered in the office of

the Clerk of the County of New York on the 10th day of July, 1914, and that said relator appeals from each and every part of said order.

Dated March 16, 1917.

Yours, etc.,

HENRY GOLDSTEIN,
Attorney for Relator-Appellant,

Office and P. O. Address, 37-39 Liberty Street, Borough of Manhattan, New York City.

To William F. Schneider, Esq., Clerk of the County of New York; Edward Swann, Esq., District Attorney, Attorney for Respondent.

166

Opinion.

Supreme Court, Appellate Division, First Department, February, 1917.

Hon. John Proctor Clarke, P. J.

" Francis M. Scott,

" Alfred R. Page,

" Vernon M. Davis,

" Clarence J. Shearn,

JJ.

No. 778.

The People ex Rel. JOHN D. IRELAND, Appellant,

v.

ARTHUR WOODS, as Police Commissioner of the City of New York,
Respondent.

Appeal by Relator from an Order Dismissing a Writ of Habeas Corpus.

George W. Wickersham, for Appellant.

Robert S. Johnstone, for Respondent.

SHEARN, J.:

The relator was indicted in the State of New Jersey. The indictment contains six counts. Five counts charge the relator and his alleged confederate with obtaining money under false pretenses on the 9th day of June, 1913, and the 12th day of July, 1913. The sixth count alleges that the co-conspirators "on or about the first day of January, in the year of our Lord one thousand
167 nine hundred and thirteen, and on divers other days between that day and the day of the taking of this inquisition at the City of Atlantic City," etc., etc., conspired to defraud persons named and divers other persons by means of worthless letters of credit and worthless checks drawn on the Little Falls National

Bank, Little Falls, N. J., made payable to different persons and signed by relator and delivered by relator to the co-conspirator and passed.

The requisition of the Governor of New Jersey was honored by Governor Whitman after a hearing and upon the production of the necessary papers. It is not claimed that there was no sufficient showing before the Governor to warrant the exercise of his jurisdiction, but on the hearing the relator attempted to overthrow the presumption of regularity by proof that he was not a fugitive from justice for the reason that he was in the State of New Jersey only three times during the year 1913, namely, twice in June and once in August, none of which visits was on or about the specific dates alleged in any of the first five counts.

It was further claimed and it is urged that the sixth count does not allege a continuing conspiracy and therefore the date of the offence alleged must be considered as of the first date specified, namely, the first of January, 1913, and since the relator proved that he was in the State of New York on that date he is entitled to be discharged. This claim is based on two grounds:

(1) That the allegation that the acts in pursuance of the conspiracy continued down to "the date of the taking of this inquisition" does not amount to fixing a definite time for the second
168 date referred to in the indictment, and therefore it is as though the indictment merely alleged a crime on January 1, 1913, and on "other days," which would of course be merely an allegation of a crime committed on January 1st. But the point is not well taken. This form of allegation for fixing a second or other day has been approved and held to be a sufficient allegation of a definite date in a number of cases in a jurisdiction that always commands respect. (*Comm. v. Wood*, 4 Gray, 11; *Comm. v. Snow*, 14 Gray, 20.) The caption of the indictment shows that it was found at the January Term, 1914, and "where there is nothing on the record showing the contrary, the time of finding the bill is to be taken to be the first day of the term of the Court" (*Comm. v. Wood*, *supra*).

(2) It is also claimed that the allegation of the commission of the crime on a day stated "and on divers other days" is not a sufficient allegation of a continuing conspiracy. This is the common and long accepted form of pleading a continuing conspiracy and has been upheld in a number of cases. (*Comm. v. Sheehan*, 143 Mass., 468; *Comm. v. Briggs*, 11 Met., 573; *Comm. v. Dunn*, 111 Mass., 426.)

It only remains to consider the effect of the relator's conceded presence in the demanding State on at least three occasions during the period covered by the sixth count. In view of the *Hoffstot* case (*N. Y. Law J.*, May 24, 1910; *Ex parte Hoffstot*, 180 Fed. Rep., 240), and *People ex rel. Meeker v. Baker*, 142 App. Div., 598, there can be no question but that the relator is a fugitive from justice within the meaning of the extradition law, for his presence in the State was not under conditions which established the impossibility of his participation in the conspiracy. True, his stay was

169 short on each occasion, but there was abundance of opportunity during his stay not only to confer with his alleged confederate, but to hand to his confederate the letters of credit and the bogus checks which, it is alleged, were used to accomplish the overt criminal acts.

It is unnecessary to consider the claims raised with respect to the first five counts of the indictment.

Order affirmed with costs.

All concur.

Waiver of Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated and agreed that the foregoing papers consist of true and correct copies of the notice of appeal to the Court of Appeals, of the order of the Appellate Division of the Supreme Court in and for the First Department, being the order appealed from; of the opinion of said Appellate Division, and of all the papers on which the Court below acted in making the order appealed from and now on file in the office of the Clerk of the County of New York; and that the certification of the same in accordance with the provisions of Section 1315 of the Code of Civil Procedure, or otherwise, be and the same hereby is waived.

Dated, New York, March 30th, 1917.

HENRY GOLDSTEIN,

Attorney for Relator-Appellant.

EDWARD SWANN,

District Attorney,

Attorney for Defendant-Respondent.

170 Court of Appeals, State of New York.

People of the State of New York on the Relation of JOHN D. IRELAND,
Relator-appellant,

against

ARTHUR WOODS, as Police Commissioner of the City of New York,
Defendant-respondent.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of John D. Ireland, by Henry Goldstein, his attorney, respectfully shows to the Court:

First. That on or about the first day of July, 1914, your petitioner was arrested by the defendant herein, Arthur Woods, as Police Commissioner of the City of New York, under a warrant of the Governor of the State of New York, dated the 29th day of June, 1914, and upon said day your petitioner obtained a writ of habeas corpus from Mr. Justice Greenbaum, one of the judges of the Supreme Court in and for the County of New York.

Second. That on or about the 7th day of July, 1914, the defendant-respondent herein Arthur Woods as such Police Commissioner made a return to said writ, wherein he alleged that your petitioner was in his custody pursuant to the said warrant of the Governor, to which return your petitioner upon said 7th day of July, 1914, duly entered a traverse.

171 Third. That in and by his petition for the writ of habeas corpus and in and by his traverse to the return made by the respondent herein, your petitioner drew in question the authority exercised in arresting and restraining your petitioner under the said warrant on the ground that the exercise thereof was in violation of the provisions of subdivision 2 of section 2 of article 4 of the Constitution of the United States and in violation of section 5278 of the Revised Statutes of the United States, in that it nowhere appeared that your petitioner was personally within the limits of the State of New Jersey at the time the alleged crimes were claimed to have been committed; and that the Governor of the State of New York had no jurisdiction to issue his warrant in that it did not appear that your petitioner was a fugitive from the justice of the State of New Jersey, and that your petitioner was not within the limits of the State of New Jersey, at any of the times when the crimes charged in the indictment, or any of them, were committed.

Fourth. That thereafter a hearing was had before Mr. Justice Giegerich in said habeas corpus proceeding upon the 8th and 9th days of July, 1914, and that such proceedings were had that on the 10th day of July, 1914, an order was entered in the office of the Clerk of the County of New York, dismissing your petitioner's writ and remanding your petitioner, with directions to the Police Commissioner of the City of New York to deliver your petitioner to the duly authorized agent of the State of New Jersey.

Fifth. That thereafter your petitioner appealed to the Appellate Division of the Supreme Court, First Department, and ob-
172 tained, pending such appeal, a stay restraining the Police Commissioner from delivering your petitioner to the custody of the agent of the State of New Jersey, and admitting your petitioner to bail pending the further order of the Supreme Court.

Sixth. That thereafter your petitioner's appeal duly came on for hearing before said Appellate Division, First Department, and such proceedings were had that on or about the 9th day of March, 1917, an order of said Appellate Division was entered, affirming said order remanding your petitioner to the custody of the Police Commissioner, and thereafter and on or about the 16th day of March, 1917, your petitioner appealed to the Court of Appeals from said order of the Appellate Division and obtained from said Appellate Division a stay of proceedings pending said appeal and was admitted to bail.

Seventh. That thereafter and on or about the 11th day of July, 1917, the said Court of Appeals affirmed said order of the Appellate Division, First Department.

Eighth. Your petitioner submits herewith an assignment of the errors claimed by him to have been made.

Wherefore your petitioner prays for the allowance of a writ of

error from the Supreme Court of the United States to the Court of Appeals of the State of New York, and for a stay of proceedings to be ordered by the Honorable Chief Judge of the Court of Appeals of the State of New York, and for bail pending the decision of the Supreme Court of the United States upon said writ of error, and for such other and further relief as may be just.

JOHN D. IRELAND,

Petitioner.

HENRY GOLDSTEIN,

Attorney for Petitioner.

Office and Post Office Address: 37 Liberty Street, Borough of Manhattan, City of New York.

174 STATE OF NEW YORK,

City of Albany,

County of Albany, ss:

John D. Ireland, being duly sworn, deposes and says that he is the petitioner mentioned in the foregoing petition; that he has read the same and knows the contents thereof, and that it is true to his knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN D. IRELAND.

Sworn to before me this 11th day of July, 1917.

DAVID MADEFELDER,

Com. of Deeds, Albany, N. Y.

On the foregoing petition a writ of error is hereby allowed as prayed for therein. A bond with sufficient sureties in the sum of one thousand dollars, which said bond is to operate as a supersedeas is hereby ordered to be executed. The defendant in error Arthur Woods, as Police Commissioner of the City of New York, his successors, deputies, officers, agents and subordinates be and they hereby are stayed and restrained from surrendering the said plaintiff in error John D. Ireland under or by virtue of the warrant of the Governor of this State, dated the 29th day of June, 1914, to

175-76 Charles N. Appel, the person named therein as authorized to receive the said John D. Ireland, and convey him back to the State of New Jersey, or to any other person whatsoever, pending the approval of the supersedeas bond herein.

Dated, Albany, N. Y., July 11, 1917.

FRANK H. HISCOCK,

Chief Judge of the Court of Appeals.

of the State of New York.

177-78

[Endorsed:] County Clerk's File No. —. Year 191.
Court of Appeals, State of New York.

People of the State of New York on the Relation of John D. Ireland, Plaintiff-Appellant, vs. Arthur Woods, as Police Commissioner of the City of New York, Defendant-Respondent.

Original. Petition.

District Attorney's Office. Received July 12, 1917, 3.40.

Henry Goldstein, Attorney for Plaintiff-Appellant, Office and Post Office Address, 37 Liberty Street, Borough of Manhattan, New York City, N. Y.

Copy Received. Edward Swann, Dist. Atty., per D. Rooney.

179 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Justices of the Court of Appeals of the State of New York, Holden at the City of Albany, New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of New York, being the highest court of law or equity of the State of New York in which a decision could be had before you or some of you in the writ of habeas corpus between John D. Ireland of the City of New York in said County and State of New York, plaintiff, and Arthur Woods, Police Commissioner of the City of New York, defendant, in a habeas corpus proceeding wherein was drawn in question the validity of an authority exercised under the State of New York on the ground that it was repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity; a manifest error hath happened to the great damage of the said John D. Ireland as by his petition appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington in the District of Columbia, within thirty days from the date hereof, and that

the record and proceedings aforesaid being inspected, the said
180-81 Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 12th day of July, in the year of our Lord one thousand nine hundred and seventeen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,
*Clerk of the District Court of the United States
for the Southern District of New York.*

The foregoing writ is hereby allowed.

Dated, Albany, New York, July 11, 1917.

FRANK H. HISCOCK,

*Chief Judge of the Court of Appeals
of the State of New York.*

182 [Endorsed:] M 2—192. County Clerk's File No. —,
Year 191—. United States Supreme Court.

People of the State of New York on the relation of John D. Ireland, Plaintiff-appellant, vs. Arthur Woods, as Police Commissioner of the City of New York, Defendant-respondent. O. Writ of error.

District Attorney's Office. Received July 12, 1917, 3:40.

Henry Goldstein, Attorney for Plaintiff-appellant, Office and Post Office Address, 37 Liberty Street, Borough of Manhattan, New York City, N. Y.

Copy received. Edward Swann, Dist. Atty., per D. Rooney.

183 United States Supreme Court.

People of the State of New York on the Relation of JOHN D. IRELAND,
Plaintiff-appellant,

against

ARTHUR WOODS, as Police Commissioner of the City of New York,
Defendant-respondent.

CITY AND COUNTY OF NEW YORK, ss:

Samuel J. Cohen, being duly sworn, deposes and says; that he is over the age of eighteen years. That on the 17th day of July, 1917, at the Police Headquarters, Grand and Centre Streets, in the Borough of Manhattan, City of New York, New York, at about 10.40 A. M. of said day, deponent served the annexed citation upon Arthur Woods, Police Commissioner of the City of New York, also known as the Chief of Police, by delivering to and leaving with the said Arthur Woods personally at the time and place aforementioned a true copy thereof.

That at the time of such service as aforesaid deponent exhibited to the said Arthur Woods the original citation, and also showed him the signature of Frank H. Hiscock Chief Judge of the Court of Appeals of the State of New York.

Deponent knew the person so served as aforesaid to be Arthur Woods, Police Commissioner of the City of New York described in said citation as the Chief of Police of the City of New York.

SAMUEL J. COHEN.

Sworn to before me this 17th day of July, 1917.

LOUIS W. DUCHELSFIEL,

Commissioner of Deeds, New York City.

184 UNITED STATES OF AMERICA, 88:

To Arthur Woods, Chief of Police of the City of New York, in the County and State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error, filed in the office of the Clerk of the Court of Appeals, State of New York, wherein John D. Ireland, of the City of New York, in said County and State, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, at Albany in the State of New York, this 11 day of July, in the year of our Lord one thousand nine hundred and seventeen.

FRANK H. HISCOCK,
*Chief Judge of the Court of Appeals
of the State of New York.*

185 [Endorsed:] United States Supreme Court. People of the State of New York on the Relation of John D. Ireland, Plaintiff-appellant, against Arthur Woods, as Police Commissioner of the City of New York, Defendant-respondent. Original. Citation.

Henry Goldstein, Attorney for Plaintiff-appellant, 37 Liberty Street, New York City.

186 Court of Appeals, State of New York.

People of the State of New York on the Relation of JOHN D. IRELAND, Relator-Appellant,

against

ARTHUR WOODS, as Police Commissioner of the City of New York, Defendant-Respondent.

Plaintiff-Appellant above named, appearing herein by Henry Goldstein, his attorney, respectfully assigns the following errors:

First. The court erred in finding that there was sufficient evidence before the Governor of the State of New York to give the said Governor jurisdiction to issue the warrant under which the plaintiff-appellant is restrained in this proceeding by Arthur Woods as Police Commissioner of the City of New York.

Second. The court erred in finding that the plaintiff-appellant was a fugitive from the justice of the State of New Jersey.

Third. The court erred in finding that the plaintiff-appellant was

within the State of New Jersey at or about the time when the crimes charged in the indictment found against plaintiff-appellant at the January term of Oyer and Terminer, in Atlantic County, or any of them, were committed.

Fourth. The court erred in holding that the last count in said indictment charged a continuing crime.

187 Fifth. The court erred in holding that the last count of the said indictment charged the commission of a crime on any day other than the first day of January, 1913.

Sixth. The court erred in holding that the presence of the plaintiff-appellant within the State of New Jersey on any occasion between January 1, 1913, and the date of the finding of the indictment herein was such and under such circumstances as to make the plaintiff-appellant a fugitive from justice upon his leaving the State of New Jersey after such presence within such state.

Seventh. The court erred in refusing to find that the authorities of New Jersey, in the papers on which the Governor of New Jersey requested the Governor of New York to surrender the plaintiff-appellant to the authorities of New Jersey for trial on the indictment annexed thereto, not only failed to show that plaintiff-appellant was within the State of New Jersey when the alleged crime was committed, but on the contrary, showed that he was not then within said State, and that the demand for his extradition was based upon the alleged presence in said State of his codefendant named in the indictment.

Wherefore the plaintiff-appellant prays that the judgment of the Court of Appeals be reversed and the plaintiff-appellant discharged from custody, and that such other and further relief be granted to plaintiff-appellant as shall be in accordance with law.

HENRY GOLDSTEIN,

Attorney for Plaintiff-Appellant.

Office and Post Office Address: 37 Liberty Street, Borough of Manhattan, New York City.

188-89 [Endorsed:] County Clerk's File No. —. Year 191-.
Court of Appeals, State of New York.

People of the State of New York on the Relation of John D. Ireland, Relator-Appellant, vs. Arthur Woods, as Police Commissioner of the City of New York, Defendant, Respondent.

Assignment of Errors.

Henry Goldstein, Attorney for Relator-Appellant, Office and Post Office Address, 37 Liberty Street, Borough of Manhattan, New York City, N. Y.

190 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, R. M. Barber, Clerk of the Court of Appeals of the said State of New York, do hereby certify that the annexed papers constitute

the original return and the whole thereof upon which the said Court of Appeals acted in rendering judgment herein, together with the remittitur of said court and the petition, order, writ of error, citation and assignment of error to the United States Supreme Court herein.

In witness whereof I have hereunto set my hand and affixed my official seal, at the City of Albany, this twenty-third day of July, A. D. one thousand nine hundred and seventeen.

[Seal Court of Appeals, State of New York.]

R. M. BARBER,
Clerk Court of Appeals, State of New York,
By WM. J. ARMSTRONG,
Deputy Clerk.

Endorsed on cover: File No. 26,078. New York Court of Appeals. Term No. 611. John D. Ireland, plaintiff in error, vs. Arthur Woods, Police Commissioner of the City of New York. Filed August 8th, 1917. File No. 26,078.

JOHN D. HIRSHMAN

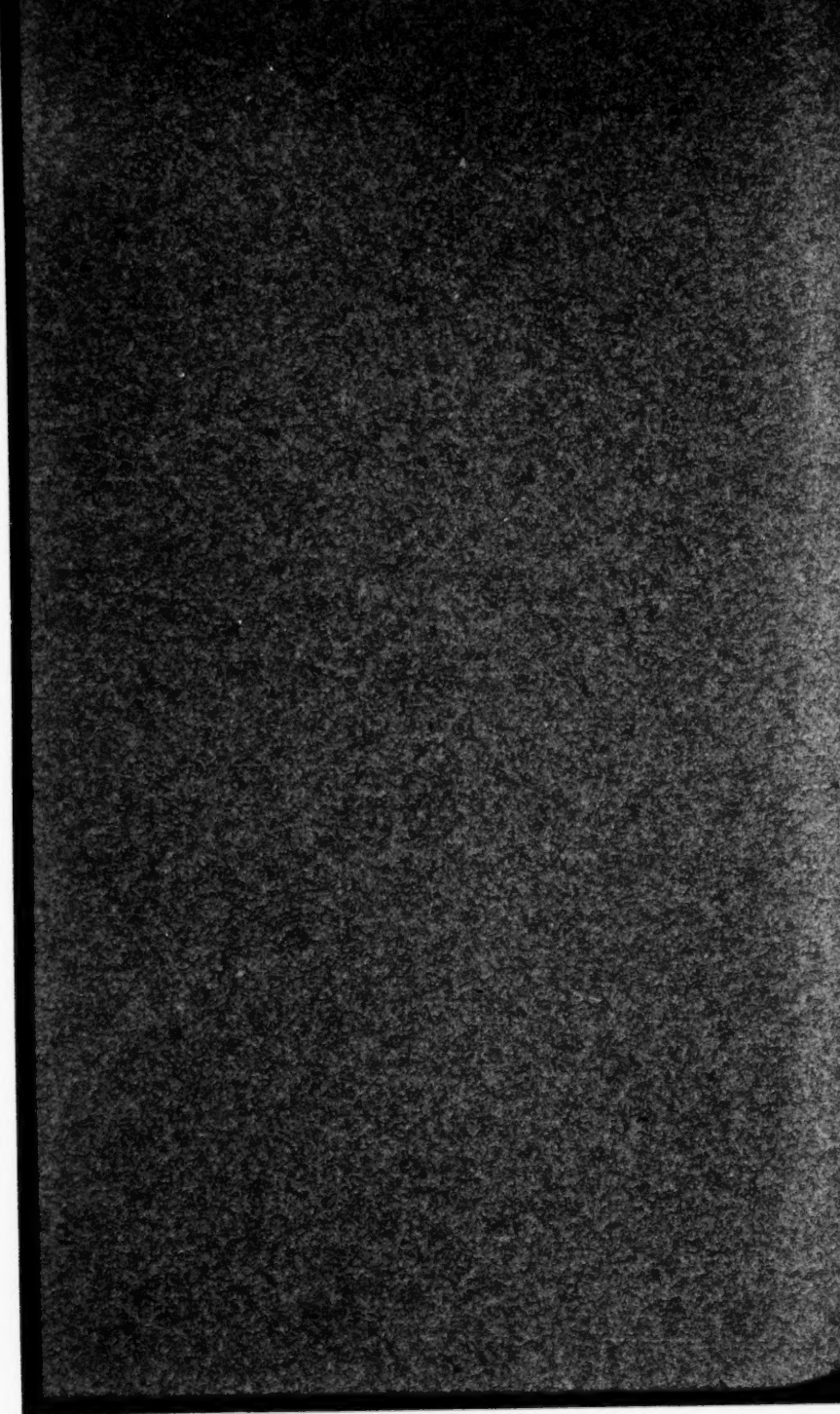
ARTHUR WOODS, Police Commissioner of the City of
New York

IN ERROR TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO ADVANCE

ERNEST SWANN
District Attorney of the
County of New York

ROBERT A. FLEMMING
Assistant District Attorney of
the County of New York
Counsel for the
Defendant



Supreme Court of the United States

OCTOBER TERM, 1917.

JOHN D. IRELAND,
Plaintiff-in-error,

against

ARTHUR WOODS, Police Commis-
sioner of the City of New
York,
Defendant-in-error.

No. 611

NOW comes the Police Commissioner of the City of New York, the defendant-in-error, and moves that this cause be advanced for a hearing before this Court and assigned for argument on the earliest date convenient to the Court during the present term, and for an order in that behalf.

The matter involved and the reasons for the application are as follows, to wit:

1. The plaintiff-in-error (hereinafter called the prisoner) was taken into custody in the City and County of New York in the State of New York on or about June 29, 1914, by virtue of a warrant issued by the Governor of the State of New York for his arrest and surrender to the State of New Jersey as a fugitive from the justice of the said State of New Jersey. He thereupon sued out a writ of *habeas corpus* in

the Supreme Court of New York in and for the County of New York. After a hearing in the *habeas corpus* proceeding, in which testimony was taken, the said Supreme Court made an order, on July 10, 1914, dismissing the writ of *habeas corpus* and remanding the prisoner, with directions to the Police Commissioner of the City of New York to deliver him to the duly authorized agent of the State of New Jersey.

The prisoner appealed from the said order to the Appellate Division of the Supreme Court of New York in and for the First Judicial Department. The argument of the appeal before the said Appellate Division was delayed for a long period of time, the prisoner in the meanwhile being at large on bail. The appeal was not argued until the 7th day of February, 1917. On March 9, 1917, the order of the Supreme Court was unanimously affirmed by the said Appellate Division.

Thereafter, on March 16, 1917, the prisoner appealed to the Court of Appeals of the State of New York from the order of the Appellate Division. The appeal was argued before the said Court of Appeals on June 6, 1917. On July 11, 1917, the order of the Appellate Division was affirmed by the said Court of Appeals.

Thereafter, on July 12, 1917, a writ of error from this Court to the New York Court of Appeals was allowed by Hon. Frank H. Hiscock, Chief Judge of the said Court of Appeals. The prisoner was admitted to bail in the sum of \$10,000.

The cause is now pending before this Court upon the said writ of error. The return to the writ of error has been filed in this Court, and the record has been printed. The case is No. 611, October Term, 1917.

In the indictment accompanying the requisition of the Governor of the State of New Jersey the prisoner was charged with the crime of Conspiracy. The contention of the demanding state before the courts of New York was that the conspiracy was alleged to have been continuously in course of commission during a period of time embracing the whole of the year 1913, and that the facts, as shown by the evidence taken, were that the prisoner was physically present in the State of New Jersey, the demanding state, on three occasions during that year—under circumstances that did not negative the possibility of his participation in the crime—and was, hence, a fugitive from justice. The contention of the prisoner was that he was not physically present in the State of New Jersey, the demanding state, at the time of the commission of the alleged crime, his claim being that the indictment did not sufficiently allege a continuing conspiracy, and that his presence in the State of New Jersey on the occasions referred to in the year 1913 was not under circumstances such as would constitute him a fugitive from the justice of the said State with respect to the crime charged.

The main questions involved in the case were (1) whether a continuing conspiracy was sufficiently laid in the indictment—as respects the period and condition of continuity and (2) whether a person, who was present in the demanding state at some time during the period of continuity of a conspiracy charged (under circumstances that did not negative the possibility of his participation in the crime) and afterwards departed from the state, could be held to be a fugitive from justice within the meaning of the law of interstate rendition.

2. The reasons for the application are:

That the interests of the State of New Jersey and the due administration of its criminal law require that the question as to whether the prisoner shall be brought back to that State to stand trial upon the indictment against him shall be determined with all convenient speed and without further unnecessary delay;

That the proceeding is a *habeas corpus* proceeding in an interstate rendition case and is in the nature of a criminal case, in that it arises in the course of and in connection with a criminal prosecution of the prisoner.

3. For the reasons aforesaid, the defendant-in-error respectfully moves for an order advancing the cause.

EDWARD SWANN,
District Attorney of the
County of New York.

ROBERT S. JOHNSTONE,
Assistant District Attorney
of the County of New York,
Counsel for
Defendant-in-error.

SUPREME COURT OF THE
UNITED STATES,

OCTOBER TERM, 1917.

JOHN D. IRELAND,
Plaintiff-in-error,

against

ARTHUR WOODS, Police Commis-
sioner of the City of New
York,

Defendant-in-error.

No. 611.

SIRS:

Please take notice that the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon, at the October, 1917, Term of the Court, to be held in the Capitol in the City of Washington, District of Columbia, on the 10th day of December, 1917, at the opening of the Court upon that day, or as soon thereafter as counsel can be heard.

Dated, New York, N. Y., November 30th, 1917.

Yours, etc.,

EDWARD SWANN,
District Attorney of the
County of New York.

ROBERT S. JOHNSTONE,
Assistant District Attorney of
the County of New York,
Counsel for the defendant-in-error.
Criminal Court Building, New York City, N. Y.

To

GEORGE W. WICKERSHAM, Esq.,
40 Wall Street, New York City, N. Y.
HENRY GOLDSTEIN, Esq.,
37 Liberty Street, New York City, N., Y.
Counsel for plaintiff-in-error.

Office Supreme Court, U.
FILED
FEB 25 1918
JAMES D. MAHER,
CLERK

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. JOHN D. IRELAND,

Relator-Plaintiff-in-Error,

vs.

ARTHUR WOODS, Police Commissioner of
the City of New York,

Defendant-in-Error.

No. 611.

October Term, 1917.

In error to the Court of Appeals of the State of
New York.

BRIEF FOR PLAINTIFF-IN-ERROR.

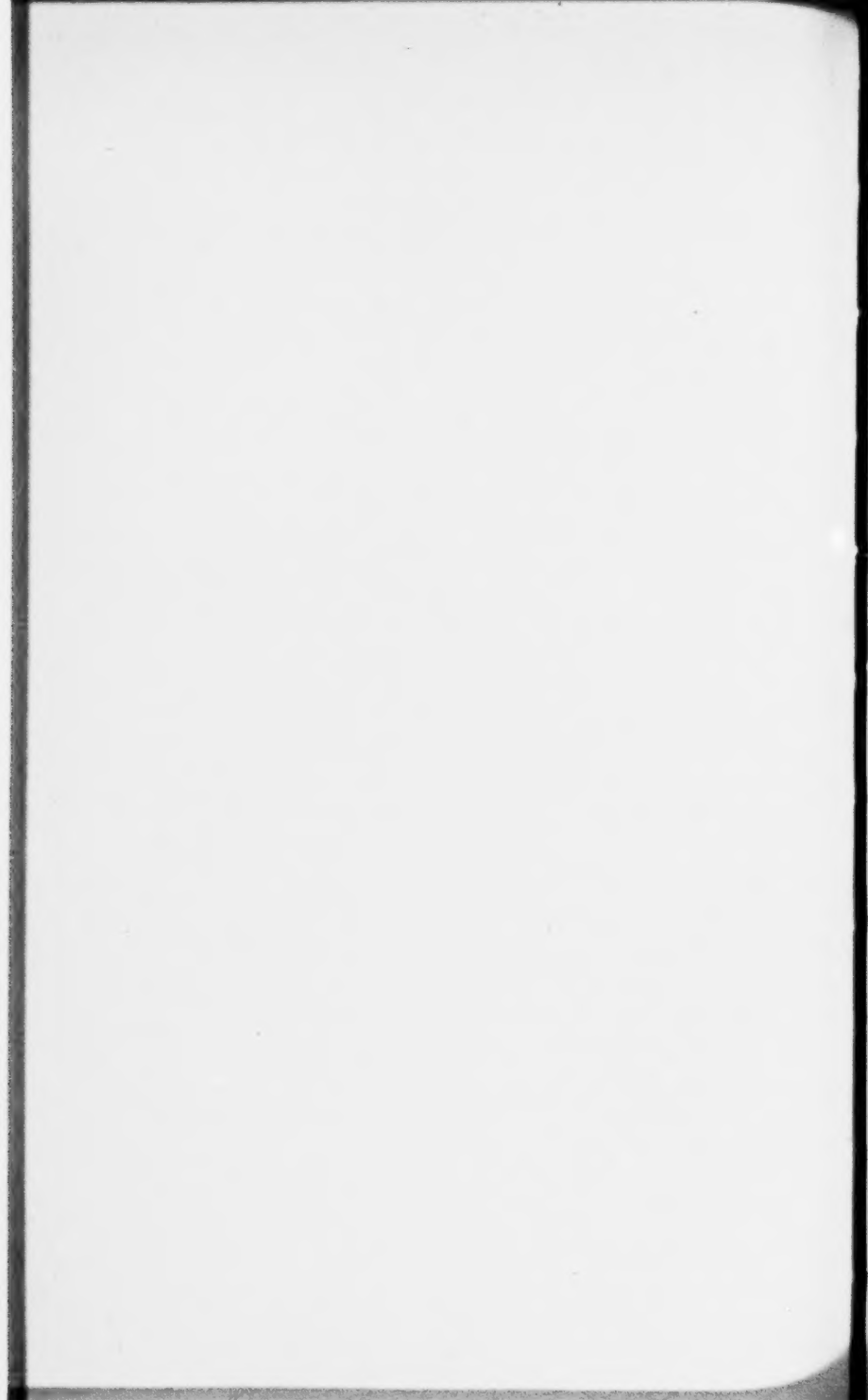
HENRY GOLDSTEIN,

Attorney for Relator-Plaintiff-in-Error.

GEORGE W. WICKERSHAM,

ARTHUR C. PATTERSON,

Of Counsel.



SUBJECT INDEX.

	PAGE
Statement of Facts.....	1 to 15
Assignments of Error.....	15 to 16
Interstate Rendition—Who are fugitives from justice within the meaning of Section 5278, U. S. Revised Stat- utes.	
Points for relator.....	16 to 57
I. The Governor of New York was without jurisdic- tion on the papers presented by the authorities of the State of New Jersey to order relator's extradi- tion	16 to 19
II. Not only was there no evidence before the Gov- ernor to sustain a finding that relator was a fugi- tive from justice, but the papers submitted on be- half of the demanding State clearly showed he was not.....	19 to 21
III. The question whether or not relator is a fugi- tive from justice, is one of the essential matters to be determined against him before his extradition can be sustained.....	22 to 27
IV. The Court below erred in holding that relator was within the State of New Jersey at or about the time when the crimes charged in the indictment were committed.....	28 to 30
V. The Court below erred in holding that relator was within the State of New Jersey on or about the days when the crimes charged were com- mitted	30 to 31

VI. The Sixth Count of the indictment does not charge a continuing conspiracy. At most, it charges a conspiracy entered into and accomplished on January 1, 1913. -----31 to 45

VII. Even if the indictment should be construed as charging a conspiracy continuing down to January 1, 1914, the evidence that relator spent three separate nights at Seabright, N. J., on dates none of which were connected with the crimes charged in the indictment, was insufficient to sustain the charge of being a fugitive from justice -----45 to 57

Appendix :

Opinion of Governor Fort, in the Matter of the application of the Prosecutor of Hudson County to the Governor of New Jersey for a requisition upon the Governor of the State of Illinois for the rendition of J. Ogden Armour.-----58 to 73

Alphabetical List of Cases.

	PAGE
Appleyard vs. Mass., 203 U. S., 222.....	5, 23
Bannon <i>et al.</i> vs. United States, 156 U. S., 464.....	33
Bassing vs. Cady, 208 U. S., 386.....	22, 25
Biddinger vs. Comm'r., 245 U. S., 128.....	6, 23
Commonwealth vs. Adams, 4 Gray, 27.....	36, 37
Commonwealth vs. Briggs, 11 Mete., 573.....	37
Commonwealth vs. Dunn, 111 Mass., 426.....	37, 38
Commonwealth vs. Odlin, 23 Pick., 275.....	36
Commonwealth vs. Sheehan, 143 Mass., 468.....	37, 38
Commonwealth vs. Snow, 14 Gray, 20.....	35, 36, 37
Commonwealth vs. Wood, 4 Gray, 11.....	35, 36
Cowley vs. People, 83 N. Y., 464.....	41
Creswill vs. Knights of Pythias, 225 U. S., 246.....	24
Hoffstot, <i>Ex parte</i> , 180 Fed., 240.....	14, 29, 45, 46, 48, 54
Hyatt vs. Corkran, 188 U. S., 691.....	22, 24, 27, 49, 56
Hyde vs. United States, 225 U. S., 347.....	33
Innes vs. Tobin, 240 U. S., 127.....	5, 22
Kansas City So. Ry. vs. Albers Comm. Co., 223 U. S., 572.....	23
McNichols vs. Pease, 207 U. S., 100.....	22, 25, 26
Munsey vs. Clough, 190 U. S., 364.....	26
Pettibone vs. Nichols, 203 U. S., 192.....	5
People vs. Adams, 17 Wend., 475.....	40
People <i>ex rel.</i> vs. Baker, 142 App. Div. (N. Y.), 598.....	14, 45, 53, 54
People <i>ex rel.</i> vs. Bd. of Police Comm'rs., 89 Misc. (N. Y.), 248.....	52
People <i>ex rel.</i> vs. Brady, 56 N. Y., 182.....	42
People <i>ex rel.</i> vs. Hyatt, 172 N. Y., 176, <i>affd.</i> 188 U. S., 691.....	21, 22, 29, 49, 55
People <i>ex rel.</i> vs. McLaughlin, 145 App. Div. (N. Y.), 513.....	24, 27, 50, 52
People <i>ex rel.</i> vs. Moore, 167 App. Div. (N. Y.), 479.....	27
People <i>ex rel.</i> vs. Police Comm'r., 100 App. Div. (N. Y.), 483.....	27

	PAGE
People <i>ex rel.</i> vs. Police Comm'rs., 83 Misc. (N. Y.), 643..	52
People vs. Sullivan, 9 Utah, 195, 33 Pac., 701.....	38
People vs. Willson, 109 N. Y., 345.....	34
Reed vs. United States, 224 Fed., 378.....	23
Reggel, <i>ex parte</i> , 114 U. S., 642.....	21, 22
Robb vs. Connolly, 111 U. S., 624	5
Roberts vs. Reilly, 116 U. S., 80	22
State vs. Temple, 38 Vt., 37	34
State vs. Thompson, 31 Utah, 228.....	39
Strassheim vs. Daily, 221 U. S., 280	5
United States vs. Kissel, 218 U. S., 601.....	31, 33, 40
United States vs. La Coste, 2 Mason, 129, 26 Fed. Cas., No. 15,548.....	39, 41
Wells vs. Commonwealth, 12 Gray, 326	39

In the Supreme Court of the United States,

OCTOBER TERM, 1917,

No. 611.

THE PEOPLE OF THE STATE OF NEW
YORK, EX REL. JOHN D. IRELAND,
Relator-Plaintiff-in-Error,

VERSUS

ARTHUR WOODS, Police Commis-
sioner of the City of New York,
Defendant-in-Error.

ERROR TO COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Facts.

This case comes up on writ of error to the Court of Appeals of the State of New York, the highest court of law or equity of that State, to review its judgment (p. 2) affirming an order of the Appellate Division of the Supreme Court, First Department of that State, which had affirmed an order of the Special Term of said Court, in and for the County of New York, dismissing a writ of *habeas corpus* brought to review the arrest and imprisonment of the plaintiff-in-error,* as an alleged

* Hereinafter referred to as the relator.

fugitive from justice, under an executive warrant issued by the Governor of the State of New York upon application of the Governor of the State of New Jersey, and remanding him to the custody of the Police Commissioner of the City of New York (fols. 179, 164, 2).

The point litigated in all the State Courts, upon which relator's liability to extradition depends, is whether or not he is "a fugitive from justice," within the meaning of section 5278 U. S. Revised Statutes. The answer to that question must depend upon whether or not he was within the State of New Jersey at or before the date when the crime whereof he is charged was committed and thereafter left the State.

The answer to the latter question depends upon a construction of the indictment annexed to the application for extradition (pp. 89-99); a pure question of law.

The local prosecutor in New Jersey, who set in motion the extradition machinery against the relator by requesting the Governor of New Jersey to issue his requisition upon the Governor of New York, did not claim that relator had been within the State of New Jersey when the alleged crime was committed. He averred that relator

*"stands charged by indictment together with one Stewart with the crime of conspiracy committed in the County of Atlantic on the twelfth day of July, A. D. 1913, and who, to avoid prosecution has kept himself without the jurisdiction of this State and is now a fugitive from justice, * * **" (Letter of Prosecutor of the Pleas, Atlantic County, N. J., p. 88).

The affidavit of Charles N. Apple, the police detective, designated as the agent of the State of New Jersey to receive and convey relator to that State, which was submitted to the

Governor of the State of New York on the application for relator's extradition, avers that relator

" stands charged by indictment with having committed the crime of conspiracy in said county," (*i. e.*, County of Atlantic, State of New Jersey) " on the twelfth day of July, nineteen hundred and thirteen ; *that while the said J. D. Ireland on the said twelfth day of July, nineteen hundred and thirteen was not personally present in the place where said crime is alleged to have been committed in the said County of Atlantic, his co-conspirator the said Charles Stewart was personally present at said place * * ** ; that since the commission of said crime the said Ireland has kept himself without the State of New Jersey and is now in the State of New York. * * *

In other words, the charge of both these officials was *not* that relator had fled from the State of New Jersey, but that he had *avoided* that State—" has kept himself without " it.

Upon the requisition of the governor of the State of New Jersey, the governor (Glynn) of New York on June 29, 1914, issued his warrant for the arrest and delivery of relator to the agent of the State of New Jersey, to be taken back to to that State (p. 6). The relator was arrested and taken into custody by the Police Commissioner, whereupon he obtained a writ of *habeas corpus* from a Justice of the Supreme Court returnable at a Special Term thereof (p. 4). The Petition for the writ of *habeas corpus* (p. 4) averred that relator was not a fugitive from justice, and charged that his arrest was illegal and that he was unlawfully restrained of his liberty in violation of Art. IV., Sec. 2, Subd. 2, U. S. Const., and Sec. 5278 U. S. R. S., in that the papers accompanying the requisition of the Governor of New Jersey failed to show that he was within the limits of the State of New Jersey when the crime whereof he was accused was alleged to have been committed, and that it appeared on the face of the in-

dictment accompanying the requisition that no crime under the laws of New Jersey was charged or had been committed, and it averred that relator was not within the State of New Jersey at any of the times when the crimes charged in the indictment, or any of them, were committed.

In response to the writ, the Police Commissioner returned that he held relator under the Governor's warrant aforesaid which he returned together with the papers on which the same was granted (pp. 7, 6).

The relator thereupon filed a traverse to the return (pages 7, 8), in which he denied that he was within the State of New Jersey at the times mentioned in the indictment upon which the requisition was issued, and alleged he was not a fugitive from the justice of that State, nor had he fled therefrom and further averred that neither the requisition of the Governor of New Jersey, nor the papers accompanying the same, contained any evidence or proof that he was in the State of New Jersey on any of the days specified in the indictment. He further affirmatively alleged that he was not within the State of New Jersey at any such times, nor when the alleged crimes were committed, nor at the time of the finding of the indictment, and that he was not a fugitive from the State of New Jersey.

The issues thus joined were heard at Part II. of a Special Term of the Supreme Court and resulted in an order dismissing the writ and remanding the relator to be turned over to the duly authorized agent of the State of New Jersey (p. 3).

From this order relator appealed to the Appellate Division of the Supreme Court, First Department (p. 3), which Court affirmed it (p. 103). The reasons for this decision were given in an opinion by Mr. Justice SHEARN, printed at pages 104-106. Relator thereupon appealed to the Court of Appeals. That Court affirmed the order without opinion (p. 2). The Chief Judge, however, while the record was in the Court of Appeals, allowed a writ of error from this Court to

review the decree and granted a stay of proceedings against relator pending the approval of a superseadeas bond (pp. 1, 108, 109), which subsequently was given and approved.

The writ of error was allowed pursuant to section 1214, U. S. R. S. (Jud. Code, § 237, as amended by Act, Sept. 6, 1916, Sec. 2), which authorizes the writ to review a final judgment or decree in any suit in the highest court of a state where there

“ is drawn in question the validity of * * * an authority exercised under any State, on the ground of their being repugnant to the constitution * * * or laws of the United States, and the decision is in favor of their validity.”

The question litigated in the State Courts was whether or not relator was a fugitive from the justice of the State of New Jersey. To establish that fact, it was necessary for the demanding State to show at least that relator was within the State at¹ or before² the time the alleged crime was committed and thereafter had departed from the State.

That a proceeding by *habeas corpus* is appropriate for determining whether the accused is subject to be taken as a fugitive from the justice of the State in which he is found, to the State whose laws he is charged with violating, is well settled.

Pettibone vs. Nichols, 203 U. S., 192.

Appleyard vs. Massachusetts, 203 U. S., 222.

In *Innes vs. Tobin*, 240 U. S., 127, 130, on a writ of error to review a judgment of the Court of Criminal Appeals of the State of Texas, the Chief Justice said :

“ Broadly there is but a single question for consideration. Was the order for rendition repugnant to the Constitution and the provisions of the Statute ? ”

¹Robb vs. Connelly, 111 U. S., 624.

²Strassheim vs. Daily, 221 U. S., 280.

But here two inquiries are involved in the solution of the ultimate question : First, When did the indictment found by the New Jersey Court charge the crime to have been committed by Relator ? Second, Was he within the State of New Jersey at the time so designated, or had he been within the State at some earlier time, under such circumstances as to warrant the inference that he might have been there in connection with the matters charged in the indictment ?

In *Biddinger vs. Commissioner of Police*, 245 U. S., 128, the Court expressly recognized that the question whether or not the accused was in the demanding state at the time the crime is alleged to have been committed is open for inquiry in *habeas corpus* proceedings brought to review the legality of an attempted extradition.

The indictment (p. 89 *et seq.*), a copy of which is annexed to the request, dated June 9, 1914, made by the Prosecutor of the Pleas upon the Governor of New Jersey for a requisition upon the Governor of New York for relator's extradition (p. 88), purports to have been found by the Grand Jury at the "January Term, in the year of Our Lord One thousand Nine Hundred and Fourteen" of the Atlantic County Court of Oyer and Terminer,—*but upon a date which is not given* (p. 89). It contains six counts. The first count (pp. 89-91) alleges that on the 12th of July, 1913, at Atlantic City, New Jersey, the relator and one Charles Stewart, alias F. F. Verline, alias Charles Stewart, alias Robert A. Smith, alias Walter Duffy, alias William Wood, conspired to obtain money from the firm of F. P. Cook Sons of Atlantic City, and then to abscond and defraud them thereof ; that in pursuance of this conspiracy Stewart, on July 12, 1913, did obtain and defraud said firm of the sum of \$100 upon a check for that amount dated Little Falls, New Jersey, July 12, 1913, drawn to the order of Charles Stewart on the Little Falls National Bank, and signed by the relator, which check was placed in the hands of Stewart by the relator, together with a letter of credit bear-

ing Stewart's name, which letter had been obtained by the relator for use in connection with the check ; that in pursuance of the said conspiracy, Stewart presented the check to F. P. Cook Sons, at Atlantic City, on July 12, 1913, to be cashed, and produced the said letter of credit as a means of identification ; that in pursuance of the said conspiracy Ireland and Stewart on said day received by means of the said check and letter of credit the sum of \$100, whereas,

"in truth and in fact the said paper writing was not then and there a good and genuine check and order for the payment of said sum of one hundred dollars, nor for the payment of any sum of money whatever, nor was the said letter of credit at the time of presentation to * * * F. P. Cook Sons, a good and genuine letter of credit, as they the said Charles Stewart, * * * and J. D. Ireland, there and then well knew, * * * " (p. 90, fol. 140).

The second count (pp. 91, 92), alleges, in similar language, a like conspiracy entered into on the said July 12, 1913, to defraud the firm of Leeds and Lippincott of the sum of \$100, by means of a bogus check on said day drawn by relator on the said Little Falls National Bank to the order of one F. F. Verline, together with a bogus letter of credit procured by relator, and the accomplishment of the object of said conspiracy on said date.

The third count (pp. 92, 93) alleges, in similar language, a like conspiracy entered into on the same day to defraud "The Shelburne, Incorporated," of the sum of \$100, by means of a bogus check drawn by relator on the said bank on the same date to the order of one Robert A. Smith, together with a bogus letter of credit procured by the relator, and the accomplishment of the object of said conspiracy on said date.

The fourth count (pp. 93-95) alleges, in similar language, a like conspiracy entered into on the same day to defraud the Traymore Hotel Company of the sum of \$100, by means of a

bogus check drawn by relator on the said bank on the same date to the order of one Walter Duffy, together with a bogus letter of credit procured by the relator, and the accomplishment of the object of said conspiracy on said date.

The fifth count (pp. 95-96) alleges, in similar language, a like conspiracy entered into on June 9, 1913, to defraud one Walter J. Buzby of the sum of \$100, by means of a bogus check drawn by relator on the said bank on June 9th, 1913, to the order of one William Wood, together with a bogus letter of credit procured by the relator, and the accomplishment of the object of said conspiracy on said date.

The sixth count (pp. 96-98) alleges that the said Stewart and Ireland, "on or about the first day of January, in the year " of our Lord one thousand nine hundred and thirteen, and on " *divers other days between that day and the day of the taking " of this Inquisition,*"—the date of which is not given—"at the City of Atlantic City in the County and State aforesaid, * * * unlawfully * * * intending and devising to cheat and defraud"—each of the persons named in the first five counts—"and *divers other persons whose names are to this Grand Inquest unknown, of certain of their moneys, then and there did falsely and fraudulently conspire, * * * to obtain and get into, their hands and possession, of and from " the persons mentioned in the first five counts, "and divers other persons whose names are to this Grand Inquest unknown, certain of their moneys of great value and then to abscond out of the State of New Jersey and defraud them thereof " ; that said Stewart and Ireland pursuant to " the conspiracy, combination, confederacy and agreement aforesaid, so as afore- " said had on " January 1, 1913, "and on divers other days between that day and the day of the taking of this inquisition "—the date of which is not given—"did then and there falsely and fraudulently obtain, and get into their hands and possession of and from " the persons named in the first five counts of the*

indictment, "and divers other persons whose names are to this Grand Inquest as yet unknown, divers sums of money of great value, the exact amount being to this Grand Inquest as yet unknown, upon certain checks, each drawn on the Little Falls National Bank * * * and each check made payable to different persons and signed by said J. D. Ireland, which said checks were placed in the hands of said Charles Stewart * * * together with certain letters of credit bearing names corresponding to the names on the aforesaid check (*sic*) and obtained by said J. D. Ireland for use in connection with said checks; and in further pursuance and according to said conspiracy, * * * amongst them, he, the said Charles Stewart, * * * being in possession of said checks and letters of credit aforesaid, did unlawfully * * * on the first day of January, in the year of our Lord, one thousand nine hundred and thirteen, *and on divers other days between that day and the day of the taking of this inquisition*"—the date of which is not given—present said checks to the persons named in the first five counts of the indictment "and divers other persons whose names are to this Grand Inquest as yet unknown, to be cashed and in connection therewith" that said Stewart produced said letters of credit and did receive divers sums of money of great value, the amount being unknown to the Grand Inquest, from the persons named in the first five counts, "and divers other persons whose names are to this Grand Inquest as yet unknown," whereas neither the checks nor letters of credit were good and genuine, as said Stewart and Ireland well knew.¹

It will be observed, that the first four counts of the indictment charge Ireland and Stewart with having unlawfully conspired on July 12, 1913, and with overt acts committed on the same day in presenting the several alleged bad checks and letters of credit and thereby defrauding the persons named of

¹ Italics are ours.

the amounts specified, and with the accomplishment of the object of such conspiracies on said date.

The fifth count charges a similar conspiracy, overt act and accomplishment on June 9, 1913.

The sixth count, in general terms, charges a series of separate conspiracies entered into between January 1, 1913 and the date of the indictment—not otherwise fixed than as found at the *January Term 1914*—to defraud the persons named in the preceding counts, by methods similar to those described in these counts, and, in vague and general terms, of overt acts of the same character as those set forth in the preceding five counts.

The proper legal construction of the indictment will be considered hereafter.

No testimony was taken before the Governor, the case having been decided by him upon the papers presented on behalf of the State of New Jersey (See Exhibit A, fols. 20-23).

At the hearing on *habeas corpus*, the relator not only objected to the absence of proof before the Governor of his presence in the State of New Jersey on any of the days mentioned in the indictment, but he introduced affirmative evidence to establish his absence from the State on those days. He testified in his own behalf and also produced a number of witnesses who corroborated his testimony. This testimony clearly established the following facts :

1. That the relator was not within the State of New Jersey on January 1, 1913, nor between that date and June 19, 1913 (*Ireland*, pp. 11-12; 14-17; *Carpenter*, pp. 27-29).

2. That he was never in Atlantic City but once, which was in the Spring of 1911 (*Ireland*, p. 21).

3. That he was not in the State of New Jersey on either of the dates specified in the first five counts of the indictment as those when the crime whereof he was indicted is alleged to have been committed (*Ireland*, pp. 11, 15, 20; see references, *infra*).

4. That between December 31, 1912, and the date of testifying before Mr. Justice GIEGERICH, he was in New Jersey but three or possibly four times, and on dates other than those specified in the indictment (*Ireland*, pp. 20, 26).

The presence of relator in the City of New York on January 1st, June 9th and July 12th, 1913, was testified to by relator, who was corroborated as to each date by four independent witnesses (*Ireland*, pp. 11, 15, 10; *Goldstein*, p. 38; *Keeler*, p. 58; *Prior*, p. 59; *Sicard*, p. 61; *Junod*, p. 62; *Coggill*, pp. 65-66; *Lawson*, pp. 68-69).

The only evidence of any kind offered by the prosecution to overcome this testimony, consisted in two checks purporting to have been drawn by relator on the Little Falls National Bank, dated respectively Little Falls, N. J., June 9 and July 14, 1913, which were offered by the defendant merely on proof of relator's handwriting, for the purpose of furnishing circumstantial evidence that he was in the State of New Jersey on those dates, and which were admitted over relator's objection and exception (*Goldstein*, pp. 44, 50, 101).

The uncontradicted testimony of the relator, corroborated by several witnesses, was that he was not in the State of New Jersey on either of the days on which said two checks were dated (*Ireland*, p. 56; *Goldstein*, p. 39; *Prior*, p. 59; *Sicard*, p. 62; *Junod*, p. 63; *Coggill*, p. 66; *Lawson*, p. 69).

There was not one single syllable of evidence to the effect that the relator was within the State of New Jersey on either of the dates specified in the first five counts of the indictment as those when the alleged crime was committed, nor that he was there on January 1, 1913, nor at any time between January 1, 1913, and the time of the finding of the indictment, except on the three dates as to which he testified himself, viz., June 19th, 1913; July 31st, 1913, and a date early in August of that year, on each of which occasions, he testified, he went to Seabright, New Jersey, and spent the night at the house of friends, returning to New York early the following morning

(pp. 12, 16, 17, 20, 28-9). He testified that on January 1st, 1913, he was in the City of New York (p. 10). Mrs. Junod, relator's sister, corroborated this, as to the period from December 31st, 1912, at 11:00 P. M., to 5:30 A. M. the following morning (p. 63), and Miss Carpenter as to the period embracing the lunch hour and the afternoon of January 1, 1913 (p. 27).

Relator's testimony that he was in the City of New York on June 9th, was corroborated by Lawrence R. Prior, who saw him on the evening of that day (p. 61), Mr. Goldstein, Mrs. Sicard, Mrs. Junod and Mrs. Campbell, as to parts of the same day. Mr. Coggill (p. 66), with whom he played golf at Garden City all day, corroborated his statement that on July 12th he was in New York, and Mr. Keeler corroborated him as to part of the day (p. 58).

This testimony which defendant-in-error's counsel seeks to brush aside by such statements as "His testimony is worthless," "It proves nothing," is corroborative of the truth of relator's entire testimony. It is not overcome merely by producing, as defendant-in-error did on the hearing, the two checks signed by relator, drawn on the Little Falls National Bank, Little Falls, N. J., signed by relator, dated on days when he is shown to have been in New York, and as to which no proof whatever was adduced to show that he had signed them in New Jersey or had negotiated or delivered them in New Jersey. Defendant-in-error's counsel at the Appellate Division said :

"On *cross-examination*, the relator was asked whether at any time during the year 1913, he had a bank account in a bank at Little Falls, N. J. At the very beginning of his *cross-examination*, he took refuge under his privilege against compulsory self-incrimination, and declined to answer any questions concerning his bank account in the Little Falls bank (fols. 96, *et seq.*). In this attitude, he was assisted by the constant interruptions and admonitions of his counsel (fols. 96-115)," (Brief, p. 21).

The facts as to this matter are, that when Mr. Patterson, relator's counsel, objected to the first question put to relator on cross-examination, (Q. Mr. Ireland, did you at any time during the year 1913 have a bank account in a bank in Little Falls, New Jersey?) the court said :

"I am inclined to sustain that objection. We have excluded evidence on one side and we must exclude it on the other. You are getting now into other matters " (p. 21).

What the court referred to was the objection which had been raised by Respondent's counsel to a question asked relator by his counsel, Mr. Patterson, as to what took him to Seabright on June 19th, 1913. Mr. Richter, Respondent's attorney, objected to this question for the following reason (p. 13) :

"The only question before your Honor is as to whether he was actually present in the State of New Jersey on one of the dates on which he is charged with having committed a crime there. Now, he cannot come before your Honor here with any defense to show while he was in New Jersey he did not take part in any alleged offense, he cannot justify his going there.

"THE COURT: Simply, the question is here, whether or not he was in the State of New Jersey.

"MR. RICHTER: He is not permitted to go into the question of defense. He cannot state that for instance he went to see his wife or children or some other reason.

"MR. PATTERSON: If your Honor please, this is not one of the dates charged in the indictment.

"THE COURT: If that is so, I sustain the objection.

"MR. RICHTER: On that subject, your Honor, we would like to say that we claim that, as a matter of law, if he was in the State of New Jersey between the dates alleged in the indictment as the dates when the conspiracy was taking place, as

the blanket charge here of conspiracy extends over a long period of time, if he was in the State of New Jersey on any one of those occasions, he must be extradited and put to his defense in the State of New Jersey and not here before your Honor " (p. 13).

A discussion thereupon ensued between the Court and counsel, and ruling was reserved until the Court should have an opportunity to send and get an authority which was cited (p. 14). Later, the authority was produced and discussed (pp. 17-19). The Court thereupon ruled that if the relator's stay in the State was very brief, he might show the purpose for which he was at the place indicated, but not otherwise ; *that if he had stayed over night, that was not brief* (p. 19). This ruling was duly objected to by relator's counsel, who asked a series of questions as to the purpose of his going to Seabright on the dates mentioned, all of which were objected to by respondent's counsel, objections sustained, and exceptions by relator duly noted (pp. 19-20).

It was in view of these rulings that the objections were made by Mr. Patterson to the questions put on cross-examination regarding relator's bank account in New Jersey, and regarding the checks, respondent's Exhibits 1 and 2, which were drawn on dates not specified in the indictment, and as to which, relying upon the advice of his counsel, relator stood upon his privilege.

The Appellate Division, in an opinion by SHEARN, J. (see pp. 104-106), held that the sixth count in the indictment alleged a continuing conspiracy ; that the caption of the bill shows that it was found at the January term, 1914, and that nothing appearing on the record to the contrary, it must be taken that the indictment was found on the first day of the term ; that the indictment charged a continuing conspiracy ; and that in view of the *Hoffstot* case (N. Y. L. J., May 24, 1910 ; 180 Fed., 240) and *People ex rel. Meeker vs. Baker*, 142 App. Div., 598, the effect of the conceded presence of relator

within the State of New Jersey on at least three occasions during the period covered by the sixth count was to make relator a fugitive from justice within the meaning of the extradition law. The Court of Appeals affirmed the order without opinion.

Assignments of Error.

FIRST. The Court erred in finding that there was sufficient evidence before the Governor of the State of New York to give the said Governor jurisdiction to issue the warrant under which the plaintiff-appellant is restrained in this proceeding by Arthur Woods as Police Commissioner of the City of New York.

SECOND. The Court erred in finding that the plaintiff-appellant was a fugitive from the justice of the State of New Jersey.

THIRD. The Court erred in finding that the plaintiff-appellant was within the State of New Jersey at or about the time when the crimes charged in the indictment found against plaintiff-appellant at the January term of Oyer and Terminer, in Atlantic County, or any of them, were committed.

FOURTH. The Court erred in holding that the last count in said indictment charged a continuing crime.

FIFTH. The Court erred in holding that the last count of the said indictment charged the commission of a crime on any day other than the first day of January, 1913.

SIXTH. The Court erred in holding that the presence of the plaintiff-appellant within the State of New Jersey on any occasion between January 1, 1913, and the date of the finding of the indictment herein was such and under such circumstances as to make the plaintiff-appellant a fugitive from justice upon his leaving the State of New Jersey after such presence within such State.

SEVENTH. The Court erred in refusing to find that the

authorities of New Jersey, in the papers on which the Governor of New Jersey requested the Governor of New York to surrender the plaintiff-appellant to the authorities of New Jersey for trial on the indictment annexed thereto, not only failed to show that plaintiff-appellant was within the State of New Jersey when the alleged crime was committed, but on contrary, showed that he was not then within said State, and that the demand for his extradition was based upon the alleged presence in said State of his co-defendant named in the indictment.

ARGUMENT.

I. The Governor of New York was without jurisdiction on the papers presented by the authorities of the State of New Jersey to order relator's extradition (First Assgt. of Error).

The learned Appellate Division fell into a singular error on this point. Mr. Justice SHEARN, in delivering the opinion of the Court, says:

"The requisition of the Governor of New Jersey was honored by Governor Whitman after a hearing and upon the production of the necessary papers. It is not claimed that there was no sufficient showing before the Governor to warrant the exercise of his jurisdiction, but on the hearing the relator attempted to overthrow the presumption of regularity by proof that he was not a fugitive from justice for the reason that he was in the State of New Jersey only three times during the year 1913, namely, twice in June and once in August, none of which visits was on or about the specific dates alleged in any of the first five counts" (p. 105).

But it *was* expressly claimed in the Petition for the writ

of *habeas corpus* (p. 5), and in the traverse to the return (p. 8), that on the papers submitted to him the Governor had no jurisdiction to grant the extradition.

Relator's counsel stated on the hearing at Special Term, without contradiction (p. 9), that no witnesses were sworn before the Governor. There was an oral argument. Respondent's counsel stated that certain concessions with respect to relator's presence in the State of New Jersey were made during the hearing (p. 9). No evidence of what such concessions were was offered by either party, nor anything to indicate that they differed from the evidence of the witnesses in the proceeding at Special Term.

This Court must therefore take it as established that the Governor acted upon the record produced from his office. The Court cannot guess that he may have had something before him not shown by the record, nor by the evidence in the *habeas corpus* proceeding.

The application of the Governor of New Jersey for Relator's extradition, which was a part of respondent's return to the writ (p. 7), was offered in evidence by relator (p. 10). It is printed at pages 87, 88 of the Record. It recites that :

" It appears by the papers required by the Statutes of the United States, which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the Laws of this State, that J. D. Ireland stands charged with the crime of conspiracy committed in the County of Atlantic in this State, *and it having been represented to me that he has fled from the justice of this State and has taken refuge within the State of New York*, Now therefore," etc. (Italics ours.)

The papers thus referred to consist of : (1) Application of C. S. Moore, Prosecutor of the Pleas for Atlantic County, to the Governor of New Jersey, dated June 9th, 1914, requesting the issue of the requisition upon the Governor of the State of New York for the extradition of the relator ; (2) a copy

of the indictment found "in the Atlantic County Court of Oyer and Terminer, January Term, in the year of our Lord One thousand nine hundred and fourteen"; (3) affidavit of Charles N. Apple, officer and detective in the Police Department of Atlantic City, sworn to June 9th, 1914.

Irene E. McKenna, a stenographer employed in the Executive Chamber at Albany, certified as to these papers, which together constitute Exhibit A :

"That she has copied and compared the foregoing requisition in the case of J. D. Ireland, and that the same is a true copy of the original requisition papers on file in the Executive Chamber, AND OF THE WHOLE THEREOF" (p. 100).

In the extradition warrant of the Governor of New York (copy of which is printed on page 6 of the Record), he makes no finding of fact, but merely recites THAT IT HAS BEEN REPRESENTED TO HIM BY the Governor of the State of New Jersey, that "J. D. Ireland stands "charged in that State with having committed therein in the "County of Atlantic the crime of conspiracy * * * and "that the said J. D. Ireland has fled therefrom and taken "refuge in the State of New York;" that the Governor of New Jersey has demanded his surrender, "which said demand "is accompanied by a copy of an indictment and other papers, "duly certified by the said Governor of the State of New "Jersey, to be authentic and duly authenticated and charging "the said J. D. Ireland with having committed the said crime "and fled from said State and taken refuge in the State of "New York," and thereupon the Governor of New York, requires the relator's arrest and delivery into the custody of the agent of the State of New Jersey to be taken back to same. *On the face of the record, the Governor's order rests entirely upon the indictment and the other papers contained in Exhibit A, and the only evidence before*

him to show that the defendant was a fugitive from justice, consists in the allegation to that effect made by the Prosecutor of the Pleas in his application to the Governor of New Jersey, at page 136, and the affidavit of the police detective, to the effect that relator "*was not personally present in the place where said crime is alleged to have been committed in the said County of Atlantic*", although his co-conspirator "*was personally present at said place, and carried out by performance the said conspiracy which had been previously arranged and entered into between the said Ireland and the said Stewart * * **"

At the Appellate Division, the respondent argued that, on the pleadings, it was not open to the relator to contend that there was no evidence before the Governor to justify his issuing the warrant. But a sufficient answer is that Mr Richter, of counsel for the demanding State, at the trial before Mr. Justice GIEGERICH, himself stated that that was one of the questions before the Court, and the trial proceeded upon that understanding (p. 9). It was not until after the appeal had been taken that the respondent raised the highly technical and, in view of the record, unmeritorious objection, that the question was not open on the pleadings.

II. Not only was there no evidence before the Governor to sustain a finding that relator was a fugitive from justice, but the papers submitted on behalf of the demanding State clearly showed he was not (Second, Third and Seventh Assgt. of Error).

The affidavit of the Agent of the State of New Jersey submitted to the Governor of that State expressly stated that

"while the said J. D. Ireland, on said twelfth day of July, nineteen hundred and thirteen was not personally present in the place where said crime

is alleged to have been committed * * * his co-conspirator * * * was personally present at said place and carried out by performance the said conspiracy that had been previously arranged and entered into between the said Ireland and the said Stewart which said conspiracy was to be consummated in said place in Atlantic County; that since the commission of said crime the said Ireland has kept himself without the State of New Jersey and is now in the State of New York * * * " (p. 100).

It will be observed that great care is taken by the New Jersey authorities not to state in these papers that relator was within the State of New Jersey when the alleged crimes were committed, and afterwards fled therefrom.

The Prosecutor of the Pleas, in his application to the Governor of New Jersey, requests the extradition of

"J. D. Ireland who stands charged by indictment together with one Stewart, * * * and who, to avoid prosecution *has kept himself without* the jurisdiction of this State and is now a fugitive from justice * * * " (p. 88).

Based on these papers, the Governor of New Jersey certifies in the usual form :

"and it having been represented to me that he (Ireland) has fled from the justice of this State and has taken refuge within the State of New York " (p. 87).

But in fact no such representation was made to him in the papers submitted. As above pointed out, the representation was not that relator had "*fled*" from the justice of the State, but that "to avoid prosecution" he had "*kept himself without the jurisdiction.*"

The application therefore was based on the theory of the constructive presence of relator within the jurisdiction where the alleged crime was committed.

That extradition cannot be maintained on such a basis, was

held in *People ex rel. Corkran vs. Hyatt*, 172, N. Y., 176 ; *affd.* 188 U. S., 691.

Respondent's counsel in the *habeas corpus* proceeding expressly disclaimed this as a basis for the extradition (p. 75).

The Governor of New York had no jurisdiction, on these papers, without more, to order relator's extradition.

Ex parte Reggel, 114 U. S., 642, was a proceeding by *habeas corpus*. The relator was arrested in Utah upon an extradition warrant granted by the Governor of that State upon application by the Governor of Pennsylvania, representing that relator stood charged in that State with the crime of obtaining money under false pretenses, and had fled from the justice of that Commonwealth and taken refuge in Utah. The evidence laid before the Governor of Utah, like that in the case at bar, was entirely documentary, consisting of a requisition in customary form by the Governor of Pennsylvania, a copy of the indictment, copies of the Penal Law of Pennsylvania and an affidavit that relator was a fugitive from justice.

From an order denying his application for discharge, &c., relator appealed to the Supreme Court, contending that there was no competent evidence before the Governor to show that he was a fugitive from justice. The Court held that "the Appellant was entitled, under the Act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process"; that in this case the affidavit referred to, in the absence of opposing evidence, was sufficient to make a *prima facie* case against the Appellant as a fugitive from justice within the meaning of the Act of Congress (pp. 651-3).

But the papers before the Governor in the case at bar do not make out even a *prima facie* case. They affirmatively show that the relator did not flee the jurisdiction of New Jersey.

III. The question whether or not relator is a fugitive from justice, is one of the essential matters to be determined against him before his extradition can be sustained.

This is practically admitted by defendant-in-error and is established by the authorities cited by him. The intimations in some of the early cases that the Governor's finding on this vital point is conclusive, were shocking to a sense of justice, and have been completely negated by the later decisions.

In *Innes vs. Tobin*, 240 U. S., 127-131, an appeal in a *habeas corpus* proceeding, after stating the general principles concerning the effect of the Constitution and Statutes of the U. S. on the extradition of fugitives from justice between the states, WHITE, C. J., says :

"Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State (*Ex-parte* Reggel, 114 U. S., 642; *Roberts v. Reilly*, 116 U. S., 80; *Hyatt v. Corkran*, 188 U. S., 691; *Bassing v. Cady*, 208 U. S., 386, 392).

"From this it results that the first inquiry here is, did it appear that the accused was a fugitive from the justice of the State of Georgia?"

In *McNichols vs. Pease*, 207 U. S., 100, 109, it was held that the Governor's finding on that point was merely *prima facie*, and that

"A proceeding by *habeas corpus* in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant

of arrest, to be taken as a fugitive from the justice of the State in which he is found to the State whose laws he is charged with violating.

"One arrested and held as a fugitive from justice is entitled, of right, upon *habeas corpus*, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding State, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

To the same effect is *Reed vs. U. S.*, 224 Fed., 378, 382 (C. C. A., 9th Circ.).

In *Biddinger vs. Commr. of Police*, 245 U. S., 128, the Court expressly recognized that the question whether or not the accused was in the demanding State at the time the crime is alleged to have been committed, was open to inquiry in a *habeas corpus* proceeding to review arrest on extradition.

This court is not foreclosed by the decision of the State Courts, either the Supreme Court or the Court of Appeals, from examining any questions of fact involved in the determination of the liability of relator to extradition under the indictment here presented. The rule is stated in *Kansas City So. Ry. vs. Albers Comm. Co.*, 223 U. S., 573, 591, as follows :

"While it is true that upon a writ of error to a State court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the federal rights set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

And in *Creswill vs. Knights of Pythias*, 225 U. S., 246, the court said, at page 261 :

“ While it is true that upon a writ of error to a State court we do not review findings of fact, nevertheless, two propositions are as well settled as the rule itself, as follows : (a) that where a federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record, the resulting question of law is open for decision ; and (b) that where the conclusion of law as to a federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the federal right.”

Defendant-in-error contends that the burden was on the relator to overcome by preponderance of proof, the presumption afforded by the Governor's warrant that he is a fugitive from justice; but the authorities sustain no such rule, and where relator introduces affirmative evidence to show that he was not a fugitive from justice, the court must decide the question upon all the evidence and must conclude in conformity with the preponderance of evidence. As the Appellate Division in the Second Department said in *People ex rel. Veta Genna vs. McLaughlin* (145 N. Y. App. Div., 513, 521) :

“ Nor does there appear any controlling reason why this concededly jurisdictional fact should be subject to any other rule as to its proof than that which controls the determination of all other questions of fact at common law.”

In *Hyatt vs. Corkran*, 188 U. S., 691 (decided in 1902), it was conceded by a stipulation that the relator was not within the demanding State at the time any of the crimes charged were

alleged to have been committed. Any discussion, therefore, as to the character and weight of evidence required to satisfy a court on *habeas corpus* that the relator is not a fugitive from justice, is *obiter*.

In *Appleyard vs. Massachusetts*, 203 U. S., 222 (decided 1906), the court, at page 230, says :

"it appeared, by a preponderance of evidence, that the accused was in the State of New York when the alleged crime was committed."

In *McNichols vs. Pease*, 207 U. S., 100 (decided 1907), the court, in considering the burden of proof, at page 109, says nothing as to the evidence necessary to make it appear that the relator is not a fugitive from justice. It might clearly and satisfactorily appear that the relator was not a fugitive from justice merely by a preponderance of evidence; and there is nothing in the opinion which holds the contrary.

In *Bassing vs. Cady*, 208 U. S., 386 (decided in 1907), the Court said at page 392 :

"The warrant of arrest issued by the Governor of Rhode Island established prima facie the lawfulness of his arrest, and, nothing to the contrary appearing in proof, it was to be taken by the court which heard this case that the accused was a fugitive from justice of the State in which he stood charged by indictment with crime."

These cases correctly state the law. When the Governor's warrant is produced, it is to be assumed that it was correctly issued, in the absence of any further evidence. Where the evidence upon which it was granted was documentary, and it is clear from such documents that a case for extradition within the statutes has not been made out, the prisoner should be discharged. Even where, as here, evidence is offered by the prisoner, it cannot supply any defect in the proof before the Governor. But waiving that point for the moment, if the Court has before it the entire record on which the

Governor acted, and evidence bearing upon the jurisdictional question, viz. : whether or not relator is a fugitive from justice, the Court can and must decide, upon the preponderance of evidence, whether the necessary facts exist to justify the extradition. In a suit by the payee of a negotiable instrument, the production of the instrument establishes, *prima facie*, that it was issued for an adequate consideration, and that the plaintiff is the owner and holder. If the transaction with reference to giving the note is then shown by evidence, the Court must decide by the preponderance of evidence whether or not there was a consideration. If any fact essential to establish consideration is in dispute, the plaintiff has the burden of proving it, notwithstanding the rule making the mere production of the note *prima facie* evidence of consideration. Or, if the defendant claims at the trial that the plaintiff is not the owner and holder, the mere production of the note, in the face of evidence introduced by the defendant to support his defense, is not sufficient, the burden still is on the plaintiff to show that he is the owner and holder of the note, and any conflict of evidence would have to preponderate in his favor to justify his recovery. So it is with the Governor's warrant in extradition cases. There is nothing in any of the authorities to contradict this contention.

In *Munsey vs. Clough*, 196 U. S., 364 (decided 1904), the relator rested his case on the warrant and papers on which the Governor acted, and introduced no other evidence. It was held that *in the absence of evidence introduced by the relator*, the warrant of the Governor and the papers upon which it was issued, were sufficient. It is to be inferred from the report that there was nothing in the papers before the Governor which showed that the relator was ~~not~~ a fugitive from justice. If there had been, it is fair to assume that the Court would have discharged him.

In *McNichols vs. Pease*, *supra*, the record of the trial on the return of the writ was not before the Court, so

that the Supreme Court had no way of telling what the evidence was. There were affidavits annexed to the writ of *habeas corpus* which, it was contended, showed that the relator was not within the demanding State at the time the crime was alleged to have been committed. The Court held that these affidavits were not before it, but went on to say *obiter* that even if they were, they did not account for all of the day on which it is alleged that the crime had been committed, and, therefore, would not be sufficient.

In *People ex rel. Hamilton vs. Police Commissioner*, 100 App. Div., 483 (decided in 1905), the question before the Court was whether an indictment accompanying the requisition was bad in law. The opinion, having this question in view, states that the warrant of the Governor is *prima facie* evidence that all essential legal prerequisites have been observed. This case has little or no weight in the contention made here by defendant-in-error, because it is elementary that the sufficiency of the indictment will not be considered if it contains a substantial charge of crime.

People ex rel. Marshall vs. Moore, 167 N. Y. App. Div., 479 (decided 1915) merely states that the warrant of the Governor is sufficient, *prima facie*, to justify the arrest of the relator. It does not consider what would be the effect of evidence introduced by the relator.

Almost all the late cases in the Supreme Court are considered in *People ex rel. Veta Genna vs. McLaughlin*, 145 N. Y. App. Div., 513, and they are all distinguished by Judge CARR in the opinion of the Court, very much as they are distinguished above.

The *Veta Genna* case is an important authority for us, because it holds that upon a writ of *habeas corpus* the Court can review the action of the Governor in ordering extradition and decide by the weight of evidence whether or not the relator is a fugitive from justice.

This too is the rule declared by this Court in *Hyatt vs. Corkran*, 188 U. S., 691, 711.

IV. The Court below erred in holding that relator was within the State of New Jersey at or about the time when the crimes charged in the indictment were committed. (Sixth Assignment of Error.)

The judgment of both the Court at Special Term (p. 83) and the Appellate Division (p. 105) was based upon the provisions of the sixth count, which was construed as charging a continuing conspiracy, beginning on January 1, 1913, and remaining operative until the date of the finding of the indictment on the undesignated day in the "January Term, 1914," which the Appellate Division held must be taken to be the first day of January.

Taking this as a fixed date, therefore, the Court further held that the presence of the relator within the State on the three occasions prior to Jan. 1, 1913, testified to by himself, while brief, was not too short to charge him with presence sufficient to constitute him a fugitive thereafter from the justice of that State.

This point was squarely raised by questions put to the relator as to the errand which took him to Seabright, which were objected to by respondent, objection sustained after argument, and exception noted (pp. 13, 19, 20). The Court at Special Term first ruled that relator might show the length of time he stopped in New Jersey, but not the purpose. After some discussion, he said :

" If the stay is so short, it may be well to receive evidence of the purpose for which the relator was passing through there or at the place, if it was a short time; *but, if it was over night, that is another proposition* " (p. 19).

The attention of the Court being called to the fact that the stay of the relator in New Jersey was not as long as that of the relator in the Corkran case, he ruled that :

" if the stay was very brief, he may show the purpose for which he was there at the place indicated, but not otherwise. * * * If he stayed over night, that was not brief."

Relator's counsel then asked him :

" Q. What took you to Seabright on the first occasion you went there, Mr. Ireland ? "

That was objected to by the District Attorney, and the objection sustained, to which relator noted an exception. A series of questions along the same line were then asked, objected to, ruled out by the Court and exceptions noted (pp. 19, 20). Thus the question was squarely raised whether or not the relator, being shown to have been within the State of New Jersey on three occasions, none of them on a date specified in the indictment, it was competent for him to show the purpose of his visits.

These rulings, we submit, were wholly erroneous. If the purpose of the visits is admissible on behalf of the prosecution, as was held in *Ex parte Hoffstot*, 180 Fed., 240, it must be equally admissible on the part of a defendant whose extradition is sought. The visit in August was after the arrest of Stewart, the alleged co-conspirator with the defendant, which took place July 31, 1913 (p. 82), after which there could be no question of continuing the alleged criminal acts. There is no rule of law which makes a visit between dinner time in the evening and early breakfast hour the next morning not brief, whereas the time between the arrival of a passenger at Hoboken before and the hour of departure for Europe of a steamer (as in the *Armour* case), is brief. The Court should have received the evidence offered and then weighed its effect.

In *Corkran vs. Hyatt*, *supra*, the relator was present for the day within the State of Tennessee, but there was no evidence

or claim that he then committed any act that brought him within the criminal law of that State. In the *Armour* case (See *Appendix, infra*, p. 58), the defendant was shown to have been in the City of Jersey City on two separate occasions: first, for the purpose of departure to Europe on a steamship leaving Hoboken for Bremen, and second, upon his arrival in Hoboken from Bremen. The mere presence of the relator at Seabright between a late hour in the evening and an early hour the following morning for the purposes of a social visit, in the absence of any evidence whatever showing the performance by him of any act connected with the alleged crime, or even communication with his alleged co-conspirator, was, it is submitted, entirely insufficient to form the basis of the charge of his being a fugitive from justice.

V. The Court below erred in holding that relator was within the State of New Jersey on or about the days when the crimes charged were committed. (Third Assignment of Error.)

It is hardly disputed that relator was not within the State of New Jersey on either January 1, 1913, June 9, 1913, July 12, 1913, the only three dates mentioned in the indictment. The evidence overwhelmingly established such absence. The Appellate Division assumed it, and (as did the Special Term, p. 83) based its judgment upon a construction of the sixth count of the indictment as charging a continuing conspiracy beginning on January 1, 1913, and remaining operative until the date of the finding of the indictment on an undisclosed date in the "January Term, 1914," which the Appellate Division held must be taken to be the first day of the Term of the Court—a day which, be it noted, was not fixed by the evidence.

Construing the sixth count as charging a criminal conspiracy entered into by relator on January 1, 1913, and

continued until after January 1, 1914, the Court held that the three brief visits to Seabright, N. J., made by relator on June 9, July 30 and during the first week of August, 1913, sufficed to bring him within the extradition process.

In the last analysis, therefore, the case turns upon the proper construction of the sixth count of the indictment.

VI. The Sixth Count of the indictment does not charge a continuing conspiracy. At most, it charges a conspiracy entered into and accomplished on January 1, 1913. (Fourth and Fifth Assignments of Error.)

It is an established rule of criminal pleading that where the time when an act charged was done becomes material, either as constituting an element of the crime, or as affording the accused a bar to the proceeding, it must be accurately stated, and a variance between the allegation and the proof is fatal.

2 Moore on Extradition, p. 945.

The only date mentioned in the Sixth Count of the indictment is January 1, 1913. The relator has proved that he was not within the State of New Jersey on that day (*Ireland*, p. 10; *Carpenter*, p. 27; *Junod*, p. 63). The general allegation of several other separate conspiracies on unmentioned dates adds nothing to defendant's case.

The sixth count does not aver that relator and Stewart on January 1, 1913, and "*continuously and at all times thereafter until the date of the finding of the indictment, conspired*," etc., which was the form of the indictment in *United States vs. Kissel*, 218 U. S., 601. It avers that said parties "on or about the first day of January, in the year of our Lord One thousand nine hundred and thirteen, and on divers other days between that day and the day of the taking of this Inqui-

sition, * * * *then and there* did falsely and fraudulently conspire, combine, confederate, unite and bind themselves by oath, covenant and agreement to obtain and get into their hands and possession of and from * * * certain of their moneys * * * and then to abscond out of the State of New Jersey and defraud them thereof" (pp. 96-97) and that pursuant to the confederation so as aforesaid had on January 1, 1913, "*and on divers other days* between that day and the day of the taking of this inquisition," did fraudulently obtain moneys, etc. (p. 97).

It is where, as in the Kissel case, "the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation," that, as the Court there held, the duration of the crime is throughout the period.

Here, however, there is no charge of such continuity. The indictment avers that relator and Stewart conspired on or about January 1, 1913, "*and on divers other days* between that day and the day of the taking of this inquisition," and that they did various acts alleged in the indictment, the time always being alleged as "the first day of January in "the year of our Lord one thousand nine hundred and thirteen, and on divers other days between that day and the "taking of this Inquisition." This, to employ the metaphor of Mr. Justice HOLMES, is at most "a cinematographic series of distinct conspiracies, rather than * * * a single one."

See *Wharton's Criminal Pl. and Pr.*, 9th ed., sec. 125.

1 Bishop's New Criminal Procedure, Sec. 388.

While it is, of course, beyond controversy that a conspiracy *may be* continuous, it is equally true that it *need not be* continuous, and that the allegations in the indictment must be resorted to to ascertain the nature of the conspiracy charged.

At common law, the existence of a conspiracy, agreement or confederation constitutes the crime without even a single overt act being done in pursuance of it (*Bannon and Mulkey vs. United States*, 156 U. S., 464, 468, 469; *Wright's Criminal Conspiracies* [Carson's American Ed., 1887], p. 124). The gist of the offense, therefore, is the *fact* of confederating, and the conspiracy lasts no longer than until the accomplishment of its object.

The distinction between conspiracies for a temporary purpose and those having continuity of purpose made in *U. S. vs. Kissel*, *supra*, was commented on in *Hyde vs. U. S.*, 225 U. S., 347, 369, where the court said that such distinction, not only can exist, but necessarily did.

"Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished, or having a distinct period of accomplishment, is different from one that is to be continuous."

The sixth count in the indictment at bar is in the ordinary form of indictment for conspiracy—not a *continuing* conspiracy. See Archbold's Crim. Pl. (24th ed., 1910) where at page 1424 the ordinary form of indictment in conspiracy is given, "that A B and C D, on the day of , A. D. , and on divers other days thereafter, between the said last-mentioned day and the day of , A. D. [at], unlawfully, etc., did amongst themselves conspire, combine, confederate and agree together (and with divers other persons, whose names are to the jurors aforesaid unknown), by divers false pretences and unlawful and subtle ways, etc., to obtain and acquire to themselves of and from divers large sums of money of the moneys of the said , and to cheat and defraud him thereof against the peace, etc."

The sixth count in the case at bar alleges the object of the conspiracy into which it is charged relator entered on January 1, 1913, to be the obtaining, by fraudulent means, of moneys of the individuals mentioned, and it is stated that the objects of this conspiracy were accomplished, although no date is given when this was done. Other counts in the indictment perhaps throw light upon that point by showing that the moneys were so obtained from the parties named in the sixth count, on June 9th and July 12th, 1913, respectively; but, if resort may not be had to these other counts for the ascertainment of the date of the accomplishment of the conspiracy, then *no date* is specified and the count is indefinite as to anything but the date of the conspiracy (*State vs. Temple*, 38 Vt., 37). On this point respondent contends and the Appellate Division holds, that the Court may look to the date of the caption of the indictment, which in this case is merely the January Term, 1914, of the Court of Oyer and Terminer, for the purpose of determining the period of the conspiracy. But there is no evidence to inform this Court when that term was begun, nor how long it continued. Moreover, the rule of reference to the caption for the purpose of determining the date of the crime charged in an indictment, is only applicable in the Court where the indictment is pending; because in that Court, judicial notice is taken of its own records, which cannot be done by a foreign Court in an extradition proceeding. For all this Court knows, the January Term of the New Jersey Court may have opened on January 31st and run for months. This indefiniteness is fatal in considering defendant's right to be advised of the date of the offense whereof he stands charged.

Independently of statute, such as that in New York (see *People vs. Willson*, 109 N. Y., 345), the rule is, that the caption must show the date when the indictment is returned.

“ The caption should also specify the time, including the year and day, when the indictment is presented,

and it has been held that if it states no time or states an uncertain, future, or impossible day, or merely gives the day of the week, or states the time with repugnancy, the omission or defect is fatal, unless it is supplied or aided, as it may be, by other parts of the record or cured by amendment."

See 22 Cyc., 234.

The Appellate Division in holding the objection to this sixth count not to be well taken, said :

" This form of allegation for fixing a second or other day has been approved and held to be a sufficient allegation of a definite date in a number of cases in a jurisdiction that always commands respect " (p. 168 ; citing, *Comm. vs. Wood*, 4 Gray, 11 ; *Comm. vs. Snow*, 14 Gray, 20).

In the first of these cases, the indictment by its caption purported to have been found " at the court of common pleas begun and holden at Greenfield within and for the County of Franklin, on the second Monday of November," 1854, and averred that the defendant, at Greenfield " on the first day of November " 1853, and at " said Greenfield from said last-mentioned day to the day of finding this indictment," without any license or authority was a common seller of intoxicating liquors.

It was objected that to charge the offense between a day certain and " the day of finding this indictment " was too indefinite. But the Court held that " where there is nothing in the record showing the contrary, the time of finding the bill is to be taken to be the first day of the term of the Court " (p. 15).

" It is to be borne in mind," it was added, " in this connection, that it is always competent to resort to the record for the purpose of fixing the exact day on which the indictment was found, whenever it becomes necessary to prove that it was found after the first day of the term. This is some-

times done in order to avoid the objection that the offence was actually committed after the finding of the bill " (p. 15).

However, this is only possible where the question arises in the Court in which the indictment is found.

Comm. vs. Snow, 14 Gray, 20, was an indictment of the same character as that in *Comm. vs. Wood*, *supra*. It purported by its caption to have been found "at a court of common pleas, begun and holden * * * on the first Monday of December" 1858, and averred that the defendant "on the first day of January now last past, and from thence continually to the day of making this presentment," was a common seller of intoxicating liquors. Held, this allegation "fixes the time by reference to that alleged in the caption, in the absence of any evidence of its having been made at a later period in fact."

In each of these cases, the caption fixed a definite date, whereas the indictment at bar refers only to the January, 1914, term, with nothing to show when that term began.

Further, the proposition of law in these cases was established only for that jurisdiction (*i. e.*, Massachusetts). It was not stated as a general proposition of the common law. Chief Justice SHAW has, himself, cast doubt upon such forms of criminal pleading, saying, in *Commonwealth vs. Odlin*, 23 Pick., 275, at page 277 :

"If this were a mode of criminal pleading, now for the first time presented for the consideration of the court, it would certainly deserve great consideration, whether it is sufficiently certain and precise to satisfy the rules of law upon that subject."

These words not only emphasize our contention that the rule stated in the *Wood* case was merely one of local law, but they are also the caution of a great jurist against adopting such a rule.

Even in Massachusetts, the last date in such an indictment must be stated with certainty. In *Commonwealth vs. Adams*,

4 Gray, 27, a continuous crime was alleged between a day certain and the date of making and filing the indictment. This indictment was held to be bad, because the date of the day of the making and the date of the filing would not necessarily be the same date, and, as the date of the filing did not appear in the indictment, even though the date of finding might be assumed to be the first day of the term, there was no presumption that the date of filing was the same. There is involved in this decision the proposition that the indictment could not be aided by referring to the court records to find the day it was filed, and thus making it certain.

In the *Snow* case, the time was laid as being from a day certain "thence continually to the making of this presentment." The caption stated the indictment to have been found at a Court of Common Pleas "begun and holden" on the "first Monday of December in the year of our Lord one thousand eight hundred and fifty-eight." Therefore, this indictment in intentment of law alleged the closing day of the period to be "the first Monday of December, 1858."

The indictment in the *Ireland* case does no such thing. There is no allegation anywhere from which the date limiting the defense can be determined and no evidence from which it can be inferred. The last count of the indictment must, therefore, be construed as being the accusation of a crime committed on January 1, 1913, the remainder of the count being surplusage.

The Appellate Division further held that the allegation charging the commission of a crime on a day stated, "and on divers other days", was the common and long accepted form of pleading a continuing conspiracy, which has been upheld in a number of cases (p. 168); in support of which they cited *Comm. vs. Sheehan*, 143 Mass., 468; *Comm. vs. Briggs*, 11 Met., 573; *Comm. vs. Dunn*, 111 Mass., 426.

Comm. vs. Briggs merely involved a question as to the admissibility of evidence.

In *Comm. vs. Dunn* the indictment was for keeping and maintaining a tenement for the illegal sale and keeping of liquors. The Court held that it being clear that the offense might be committed by keeping the tenement for one day or for a longer time, and the indictment charging such a keeping on October 28, 1872, and from that day to the day of the "finding of this indictment, the necessary conclusion is that it duly charges the commission of the offense during a single period, beginning on said October 28 and ending on the day of the finding of the indictment, and is not bad for duplicity."

The offense, it should be observed, in that case was necessarily continuous—viz.: keeping and maintaining a tenement, etc.

Comm. vs. Sheehan, 143 Mass., 468, was a complaint at law for maintaining a common nuisance in keeping a tenement for the illegal sale of liquors. It charged that defendant kept and maintained a common nuisance on the 1st day of August, 1886, "and on divers other days and times between that day and the third day of September." It was held that these last quoted words "add nothing to the previous charge, and are unnecessary, but they do not charge a separate offense. The clear meaning of the allegation is, that the defendant kept the nuisance on the first day of August, and on divers other days and times between said day and the third day of September, including said third day of September. The complaint charges but one offense committed during a single period of time, and is not bad for duplicity."

In *People vs. Sullivan*, 9 Utah, 195, 33 Pacific, 701 (1893), it was held that an indictment which lays an offense as having been committed on the 1st day of January, 1891, and on divers times thereafter from the day last aforesaid, to-wit, January 1, 1891, up to and including the 19th day of September, 1891, charges an offense only as to the two days mentioned, the *continuando* being bad (Bishop, Criminal Proceed-

ure, Section 395) ; so that a person convicted upon such an indictment can afterwards be convicted of a similar offense committed August 1st, 1891, without violating his constitutional right not to be tried twice for the same offense.

In *State vs. Thompson*, 31 Utah, 228, the information which alleged the commission of the crime of adultery, "on the 13th day of February, 1905, and on divers other days and thence continually between the said 13th day of February, 1905, until the 1st day of August, 1905," was challenged for duplicity, but the objection was overruled, the court saying :

"The allegation that the offense was committed on a certain day and thence continually between certain days, charges but one offense, because the day of another offense committed is not sufficiently specified. Each act of adultery constitutes a separate offense. Adultery is not a continuous offense. A *continuando* is not necessary unless for an essentially continuous offense. When an information sufficiently charges an offense, not essentially continuous, committed on a specified day and year with an unnecessary *continuando*, the *continuando* does not injure the information, but may be rejected as surplusage" (p. 232).

See *United States vs. LaCoste*, 2 Mason, 129, 140.

In *Wells vs. Commonwealth*, 12 Gray, 326, 328, the indictment charged the keeping of a house of ill-fame on the 1st day of December in the year 1857, and on divers other days and times between said 1st day of December and the 1st day of June, 1858. The court said :

"It is an indictment for a nuisance, which is an offense that may have continuance, and may therefore be laid with a *continuando*. And the general rule is well established, that when an offense, which may have continuance, is alleged to have been committed on a day certain and on divers other days which are uncertainly alleged, the indictment is effectual for the act alleged on the day certain, and void only as to the act alleged on the other days."

So here, the crime charged in the indictment under consideration, being conspiracy, *may* have continuance, and may therefore be laid with *continuando* ; but the allegation being that the conspiracy was entered into on or about the 1st day of January, 1913, "and on divers other days between that day and the day of the taking of this inquisition," the indictment under the rule above quoted is effectual only so far as concerns the act alleged on the day certain, and void as to the acts alleged on the other unspecified days. It does not, therefore, charge a continuing conspiracy.

The indictment in the *Kissel* case, 218 U. S., 601, was taken out of the application of this rule, simply because, as the Supreme Court said, while the unlawful agreement *satisfies* the definition of the crime, it does not *exhaust* it, and

"when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, it is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one " (p. 607).

The indictment at bar charges no such continuity, and therefore is not entitled to the benefit of the rule established in the *Kissel* case.

In the State of New York, the sixth count of the indictment is probably good as charging a criminal conspiracy accomplished on January 1, 1913, the remainder of the count being rejected as surplusage.

See *People vs. Adams*, 17 Wend., 475.

That case came before the court on a writ of error to review a judgment of conviction under an indictment charging "for that on the first day of June, 1836, and on divers other days and times between that day and the day of finding the

indictment (to wit, 12th September, 1836)," the defendant Adams sold liquor without a license.

The judgment was affirmed on appeal, but the court (NELSON, C. J.), in discussing the indictment said, said at page 476 :

"It is said that the count is too general, and does not apprise the defendant sufficiently of the offense charged, so as to enable him to prepare for his defense. The only ground for complaint in this respect must relate to *time*, the offense being laid on a *particular day* with a *continuando*. * * * In every other respect the count is sufficiently explicit and particular. Certainty in charging the offense to a common intent is all that is required by the rules of pleading in regard to indictments ; this, however, is a very general expression, and usually must depend upon what may be the judgment of the court in the matter. There can be no general rule applicable to all cases, governing the objection. As to *time*, the count, I think, is sufficiently certain, a day being mentioned ; the *continuando* may be rejected as surplusage. Sergeant HAWKINS says (b., 2 ch. 25, § 82), that if an indictment charge a man with having done such a nuisance on such a day and year, &c., and on *divers other days*, it is void only as to the facts on those days which are uncertainly alleged, and effectual for the nuisance on the day specified. * * * Again he says, § 74, that if an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good for the residue. This is a general principle, applicable to all indictments, and indeed to every description of pleadings, upon the maxim, *utile per inutile non vitiatur* (1 Chitty's Pl., 232). Here the *uncertain time* may be entirely rejected, and the indictment is still good ; the offence charged being laid under a particular day."

Cited with approval by FOLGER, C. J., in *Cowley vs. People*, 83 N. Y., 464, 472.

See also STRONG, J., in *United States vs. La Coste*, 26 Fed. Cas., No. 15,548.

In *People ex rel. Lawrence vs. Brady*, 56 N. Y., 182, after analyzing the indictment and affidavits which accompanied a requisition from the Governor of Michigan, and holding that they did not charge a crime, the Court per ANDREWS, J., said, at pages 190, 191 :

“ It cannot be held that any less degree of certainty is admissible in an affidavit charging the conspiracy, than is required in an indictment for the same offense. * * * If a conspiracy to do a wrongful act, affecting the property of another is an offense in the State of Michigan, although neither the end or the means (disconnected with the confederacy) are criminal, that fact should have been shown by the affidavits. * * * It would be a dangerous precedent if it should be held that a man could be deprived of his liberty and removed to another State, upon an accusation so vague and unsatisfactory as is contained in the affidavits in this case. It is a reasonable rule, supported by obvious considerations of justice and policy, that when a surrender is sought upon proof, by affidavit, of a crime, the offense should be distinctly and plainly charged. Security to personal liberty demands this, and the State will meet the full measure of its obligation, under the federal Constitution, if it requires this before consenting to the arrest and removal of alleged offenders.”

The same reasoning applies with equal force when the question is as to the date when the alleged crime was committed, in order that it may be determined whether or not the defendant, a resident and citizen of the State of New York, was within the demanding State at the time the alleged crime is claimed to have been committed. Vagueness and uncertainty in this particular are as fatal to the requisition for removal as would be vagueness and uncertainty as to the facts alleged to constitute the crime.

A proceeding, which very closely resembled the case at bar, arose upon an application made by the District Attorney of

Hudson County, New Jersey, to the Governor (Fort) of that State for a requisition upon the Governor of Illinois for the rendition to the former State, of J. Ogden Armour, a resident of Chicago. The Governor, in an opinion (reported, in part, 33 N. J. Law J., 174), a complete copy of which has been furnished us by Messrs. Lindabury, Depue and Faulks, Attorneys for Mr. Armour in the proceeding, and a copy of which is annexed as an appendix to this brief, refused the application. The facts were as follows :

J. Ogden Armour was indicted at the December Term, 1909, by the Grand Jury of Hudson County. The indictment alleged that certain packing companies were engaged in the business of buying, selling and dealing in cattle, hogs, sheep and other live stock and the products thereof, and in the construction and maintenance of packing houses, cold storage plants, and the like, and in buying, transporting and selling animal and vegetable products. That on the first of March, 1908, at Jersey City, the Companies and their directors unlawfully agreed to produce an artificial scarcity in the supply of meats and poultry and to increase the price thereof, and that upon the said date they agreed among themselves to create a monopoly of the meat and poultry supply of New Jersey. That in pursuance of this agreement, on December 14, 1908, certain persons, among them said Armour, were elected directors of the National Packing Company, and that this company and the directors, among them Armour, did, in furtherance of said agreement, on the first day of March, 1908, "and thence continuously until the date of the presentation of this indictment" unlawfully maintain store houses and cold storage plants for the storage of large quantities of meat and poultry.

The evidence relied upon to show that Armour had been within the State of New Jersey at any of the times mentioned in the indictment, was an affidavit of the Chief Steward of the steamship Kaiser Wilhelm II., who swore that on the

28th of April, 1908, Armour was a passenger on this steamship and left Hoboken on that day and that he was also a passenger on the same vessel returning from Bremen, June 15, 1909, and arriving at Hoboken about a week later.

Governor Fort, in the course of his opinion, after finding that there was no evidence that Armour was within the State on any of the specific dates alleged, took up the consideration of the question whether, in view of the allegation that overt acts were continuously performed within the jurisdiction from March 1, 1908, to December, 1909, Armour was a fugitive from justice because of his admitted presence within the State on the two occasions above referred to.

The question was stated as follows :

“The sole question which remains to be considered is whether under the general allegation of the indictment that the overt acts continued on each and every day from the first day of March, 1908, until the time of the finding of the indictment, the affidavit as to the presence of J. Ogden Armour in Hoboken is sufficient for the purposes of these proceedings.”

The Governor resolved this question in the negative, saying :

“While it is perfectly true that upon the trial of the indictment if the State had by proper process obtained jurisdiction over the person of J. Ogden Armour, the prosecution would not be limited to the dates named in the indictment; at the same time it must be considered as established, both by reason and authority, that the defendant is entitled to regard those dates as material for the purpose of establishing his status with reference to the extradition process, unless proof is offered that the crime was, in fact, committed at another date, of which he may have notice, or that his presence within the State with reference to any continuous crime at another date than that mentioned was under such circumstances as to establish the rea-

sonable inference of his presence within the State for some purpose connected with the criminal act. *Language is an indictment sufficient for purposes of trial may be too indefinite and general to form the basis of an extradition charge.*" * * *

"The indictment in the present case fixes two dates as the time of specified criminal acts. The proof offered as to the presence of J. Ogden Armour within this State does not coincide with either of these dates within any reasonable limits, and no proof being offered that the specified dates are not in fact correct, the general allegation of a continuance of the criminal acts practically for the entire period within which the statute of limitations might operate is neither sufficiently definite nor, in my judgment, reasonable for this purpose" (Italics ours).

This case goes much further than is necessary to sustain the position of the relator in the case at bar, for the indictment there charged a *continuing* conspiracy within the definition in the *Kissel* case, *supra*. If the rule laid down by Governor Fort may be taken as the law of New Jersey, it is perfectly clear that this relator should be discharged. He is entitled to his discharge under a much stricter rule, for the reasons above given.

VII. Even if the indictment should be construed as charging a conspiracy continuing down to January 1, 1914, the evidence that relator spent three separate nights at Seabright, N. J., on dates none of which were connected with the crimes charged in the indictment, was insufficient to sustain the charge of being a fugitive from justice. (Sixth Assignment of Error.)

The cases relied upon by the Appellate Division to sustain a contrary ruling, are *Ex parte Hoffstot*, 180 Fed., 240 and *People ex rel. Meeker vs. Baker*, 142 App. Div., 598.

In the *Hoffstot* case, the relator was indicted in Pennsylvania upon a charge of conspiring with James W. Friend and Charles Stewart to bribe members of the Council of the City of Pittsburg to pass an ordinance designating certain banks of that City as depositories for public funds. Hoffstot was a resident of New York, but had business interests in Pittsburg that took him there about once a month, when he would stay for a day or two. Each count in the indictment alleged that the crime had been committed on June 3rd, 1908. There was a hearing before the Governor of New York, from which state Hoffstot's extradition was sought, at which it was proved that Hoffstot was in New York upon that date, but that he had been in Pittsburg in the latter part of April in that year, and on the 28th of May and the 29th of June. It does not appear that any testimony was taken before Judge HOLT on the hearing before him upon the return of the writ of *habeas corpus*, and the decision seems to have been based upon the evidence taken before the Governor.

Judge HOLT decided that, upon the evidence taken before the Governor, the writ should be dismissed and the relator remanded to custody. The reasons for the decision and the facts upon which it is based appear in the following language of the opinion (page 243):

"Evidence, however, was taken before the Governor of New York upon the question whether Hoffstot did anything in furtherance of the conspiracy in Pennsylvania. Mr. Seymour, the assistant district attorney of Allegheny county, was examined, and he testified that *there was evidence before the grand jury, upon which this indictment of conspiracy was found, as as to transactions tending to prove the conspiracy which extended over a period from about the 1st of May to about the 1st of July, 1908.* The Governor declined to go into the details of these transactions. Upon cross-examination Mr. Seymour was asked whether there was any evidence before the grand jury tending to show any

act on the part of Mr. Hoffstot committed in the state of Pennsylvania when he was physically present there at any time during the period mentioned to which he at first replied that he did not think there was. *He subsequently testified, upon further examination, that there was circumstantial evidence as to acts by Mr. Hoffstot in the state of Pennsylvania while he was within that state during that period ; that there was no direct, positive testimony by anyone who saw him there, but there was circumstantial testimony that he was there.*

" This evidence is undoubtedly vague ; but I think that the substantial effect of it is that, while there was no specific evidence by an eye-witness that Hoffstot was in Pennsylvania on any particular day on which any act in furtherance of this conspiracy was done, there was circumstantial evidence from which a jury would be justified in drawing the inference that he was there on such a day. Now, if it shall be proved that a conspiracy was entered into by Mr. Hoffstot, and circumstantial evidence shall be offered sufficient to authorize a jury to draw the inference that he was present in Pennsylvania when any act material in carrying out the objects of the conspiracy was done, I think that he would be properly held to have been within the state of Pennsylvania at the time that the crime charged in the indictment was committed, and that his subsequent return from that State to New York would render him a fugitive from justice within the meaning of the United States Constitution and statute upon that subject." (Italics ours.)

On appeal, the decision of Judge HOLT was affirmed (on a motion to dismiss or affirm) without opinion (218 U. S., 665). The record in the Supreme Court of the United States (No. 22188) contains the testimony given before Governor Hughes, whose opinion appears at page 35. It there appears that it was shown on the hearing before the Governor that there had been a presentment made by a grand jury in Pennsylvania, which was referred to by indorsement on the indictment against Hoffstot, from which it appeared that the conspiracy

had continued over a long period of time, including the occasions when Hoffstot admitted he was in Pittsburgh ; and there was testimony, brought out by Hoffstot's attorney, to the effect that there had been circumstantial evidence before the grand jury that indicted him showing that Hoffstot had been within the State of Pennsylvania at a time when some act or acts in connection with the conspiracy had been performed, and there was circumstantial evidence of acts upon Hoffstot's part during that period (See Record to Supreme Court, fols. 35, 36 ; also N. Y. L. J., May 24, 1910).

In the case at bar there is no such evidence. The demanding State was content to try the case upon the assumption that the indictment alleged the correct dates, and there is no evidence in the record that there was any mistake in laying the dates, or that there was a conspiracy lasting over a period of time, such as was shown by the evidence in the *Hoffstot* case. Consequently, so far as the first five counts are concerned, the case at bar certainly does not fall within the doctrine of the *Hoffstot* case. Under the preceding point we have sought to demonstrate that the Sixth Count has no different effect.

Judge HOLT, in his opinion in the *Hoffstot* case, followed the reasoning of Governor Hughes. In the case at bar, it cannot be said, to paraphrase the language of Governor Hughes, that the charge which Ireland would be called upon to meet, would be one of conspiracy extending over a period of time.

The view that Governor Hughes took of the law, and the ground upon which he based his decision, appear from the following extracts from his opinion :

At page 36, folio 55, the Governor says :

“ But it is the contention of the Commonwealth of Pennsylvania that it is not limited to the precise date mentioned in the indictment, and that the crime was not committed on that particular day but during a period extending through May and June, 1908. The

endorsement upon the indictment states that it was founded upon a presentment and a recital appended to the indictment is to the same effect. A copy of this presentment admitted to be authentic, was submitted to me upon the hearing by counsel for the accused."

Page 38, folios 58 and 59 :

"In view of the statements in the presentment and those made upon the hearing before me, I must conclude that the charge which the accused, if surrendered, would be called upon to meet under the indictment, is not limited to the 3rd day of June, 1908, but would embrace an extended period covering the months of May and June in that year."

The Governor then asks whether in an extradition proceeding the demanding State is absolutely bound by the date specified in the indictment and after saying that it is not always so bound, he adds (folio 59) :

"Undoubtedly where there is nothing before the Executive to show that the charge relates to any other time, he is justified in refusing to surrender the accused if it clearly appears that on the date specified the accused was not within the demanding state."

The Governor quotes with approval from the *Hyatt* case as reported both in the Court of Appeals and in the Supreme Court upon the above point. At page 40, folio 62 :

"The date alleged in the indictment is frequently selected arbitrarily. If there is no claim that the offense was committed at another time, of course the date alleged is the only time before the Executive and he must make his decision accordingly. But if it satisfactorily appears that a charge relates to another time and that the accused is a fugitive from justice with respect to the actual charge, there is no public policy in making it necessary to have a new indictment found, with a more exact reference, in order that rendition should be had."

In the case at bar there is no contradiction of Ireland's testimony that he was not within the State of New Jersey at the times the crimes mentioned in the first five counts of the indictment were alleged to have been committed, and nothing was brought out upon cross-examination to affect its weight and credibility. There was offered in evidence on behalf of the respondent two checks respectively dated Little Falls, New Jersey (these words being printed on the checks), June 9, and July 14, 1913, and it is claimed that these checks furnished some circumstantial evidence that Ireland was within the State of New Jersey on the days of their dates (pp. 46-7, 50). These checks are no evidence of Ireland's presence at that date. No evidence was introduced showing when or where the checks were signed by relator nor to whom they were given.

The rule that in an action upon a negotiable instrument the paper sued on is presumed to have been drawn at the time and place of its date, is merely a rule of procedure for the Government of trials in such cases, and does not obtain where the suit is not upon the instrument. The checks were not indorsed; no proof was offered showing how they came into the hands of defendant's counsel.

But even assuming that there is *some* evidence that Ireland was in New Jersey at the time any of the crimes is alleged to have been committed, the *weight of evidence* is that the relator was *not* within that state at that time, and the issues in such a proceeding as this must be decided according to the weight of evidence. *People ex rel. Veta Genna vs. McLaughlin*, 145 App. Div., 513.

In that case, the relator was indicted in Illinois for murder in the first degree. The Governor of Illinois made requisition on the Governor of New York for his extradition, the warrant was issued, and the relator arrested thereunder. A writ of *habeas corpus* was issued to determine the legality of his detention. The return showed the warrant, the requisition of

the Governor of Illinois, and the indictment. The relator traversed the return by denying that he was in the territory of Illinois at the time of the commission of the crime, or at any time thereafter. The Court thereupon took oral proof upon the issues raised by the traverse. The Special Term decided that, while the preponderance of evidence showed that the relator was not within the State of Illinois at the time the crime was committed, yet, as there was a conflict of evidence upon the point, the Court had not the power to determine that the prisoner had not been in the demanding State at the time of the commission of the crime. The Special Term based this decision on the ground that the evidence established an alibi, and was therefore matter of defence to be proved on the trial, and dismissed the writ. The Appellate Division, Second Department, reversed this decision, and held that the Special Term must decide by the preponderance of evidence whether the relator was within the demanding State at the time the crime was committed, even though such decision would also establish an alibi.

The Court said, at pages 515, 516 :

“ An alibi in its general features consists of proof that the defendant was not at the scene of the crime at the time of its commission. Proof that the prisoner was not in the demanding State at the time of the commission of the crime is necessarily proof that he was not at the scene of the crime. But the question involved in extradition proceedings is not whether the defendant was at the scene of the crime at the time of its commission, but whether he was anywhere within the demanding State when the crime was committed. This latter question had (*sic*) nothing to do with the guilt or innocence, but it has all to do with the question whether the prisoner has fled from the demanding State and is, therefore, a fugitive from justice.”

At page 521 :

“ Nor does there appear any controlling reason why this concededly jurisdictional fact should be subject to

any other rule as to its proof than that which controls the determination of all other questions of fact at common law. In order that a fact may be determined conclusively in any judicial proceeding, it is not necessary that the proofs should be without any conflict. Nor does proof fall short of being conclusive simply because there is other proof to the contrary. The true rule should be that this question of jurisdictional fact must be determined by the court as is any other question of fact which it has the power and duty to determine, according to the rule of the common law as to the preponderance of evidence. Any different rule might easily lead to most oppressive consequences, which suggest themselves at once to any observing mind. We are of opinion, therefore, that the learned court at Special Term was in error when it declined to make determination on the question of whether the prisoner at bar was within the State of Illinois when the crime was committed, in the face of proofs which it has declared, in its opinion, to be 'complete and satisfactory' to the effect that he was not there at the time in question.

"As was before stated this question of jurisdictional fact was put in issue by the traverse to the return to the writ of habeas corpus, and must be determined upon the proofs taken by the court before the writ may be dismissed and the prisoner remanded."

This case was followed and approved in *People ex rel. Fuchs vs. Police Commissioners*, 83 Misc., 643, by Mr. Justice FORD. In *People ex rel. Debono vs. Board of Police Commissioners*, 89 Misc., 248, Mr. Justice LEHMAN declined to follow the *Genna* case, and implied that a rule less favorable to the relator was the correct rule; but the learned Justice does not lay down an intelligible rule himself, although he attempts to state one, and his criticisms of the *Genna* case are so well anticipated and answered in the opinion of the Court in that case itself that we can add nothing to the discussion.

Nor is *People ex rel. Meeker vs. Baker*, 142 App. Div., 598, controlling upon the facts of this case. Indeed, it is similar to the *Hoffstot* case. Its decision depends upon the same principles and its facts are clearly distinguishable from those in the case at bar. Meeker, the relator, was indicted by the Grand Jury of Dallam County, Texas, for a common law conspiracy, claimed to have been entered into on or about January 26, 1910, with Richey and Perkins to defraud Mattingly out of the sum of \$2,400. The scheme alleged was that Perkins should go to London, England, and advertise as President and General Manager of the London Commercial Banking Company and represent to the public that that corporation was incorporated for \$1,000,000 paid up capital and was a solvent and reliable banking institution. Meeker was to draw drafts on said Company and endorse them to Richey who was to sell them to Mattingly, after representing to him that the drawee was solvent, and that Meeker and Richey each had large sums on deposit with it. Richey was to request Mattingly to communicate by cable with the Company, whereupon Perkins was to verify the statements by Richey. It was alleged in the indictment that the above conspiracy was accomplished by means of four drafts drawn by Meeker to his own order aggregating £500 and endorsed by him to Richey and by Richey turned over to Mattingly who, having received a cable from Perkins, paid Richey in pursuance of the conspiracy a sum of \$2,400 for the drafts, which were never honored. The indictment further alleged that the conspiracy was entered into in the County of Dallam and the sum of \$2,400 paid by Mattingly in that County.

The relator being in the State of New York, a requisition for his rendition to Texas was issued by the Governor of that State and after the relator had been arrested on the warrant of the Governor of New York he obtained a writ of *habeas corpus*. Upon the hearing thereon the relator testified that

he left New York on January 15, 1910, upon a trip in the course of which he visited Richey at Clayton, New Mexico; which place he reached on Monday, January 25th, but he denied ever having been within the State of Texas during that trip, or that he had ever gone to Texline, the place where it was alleged that the conspiracy had been made and the acts in pursuance of it performed. Texline was just over the New Mexico border within the State of Texas. Upon cross-examination the relator was shown his memorandum book in which appeared an entry, in his own writing, under date of January 22, 1910, to the effect that he had that day driven to Texline, Texas. There was also evidence presented to the Governor in the form of affidavits, to the effect that Meeker had been in Dalhard, Texas, on January 22. There was also evidence that Richey had said to one Miller in Meeker's presence on January 23rd, that Richey and Miller had been in Texline, Texas, and that Meeker had not denied the statement. The relator himself admitted that he had drawn the drafts in question and given them to Richey between January 22nd and January 28th. From all of the foregoing testimony and from other evidence not necessary to repeat here, the Court came to the conclusion that although Meeker had at first denied ever having been in Texline he *was* actually in Texline, at least on January 22, 1910, if not on other occasions. Further, it was between that date and January 28th that the spurious drafts had been drawn by Meeker. It is, therefore, clear that the demanding State was not bound by the date alleged in the indictment, because evidence was given in the extradition proceedings from which it appeared that the charge that the relator would be required to meet, if put on trial in Texas, did not refer to the identical date mentioned in the indictment, but to a date a little before that time. Further, the indictment laid the date as *about* January 26th and not on that particular day.

The *Hoffstot* and the *Meeker* cases, therefore, do not conflict, in any way, with the rule laid down in the *Hyatt* case that

the date alleged in the indictment as that upon which the crime was committed must govern, unless it appears that there was a mistake in the date as laid, or that the crime alleged is claimed to have been committed on some other day. In both these cases there was evidence to the effect that the crimes alleged had been committed upon some dates other than those stated in the indictments. In the case at bar there is no such evidence and no such claim.

In *People ex rel. Corkran vs. Hyatt*, 172 N. Y., 176, the relator was indicted for having committed the crime of larceny and false pretenses in Tennessee on May 1st and May 8th, 1901, and June 24th, 1901, respectively. He admitted that he had been within the State of Tennessee on July 2d, 1901, or one week after the date of the last crime, and it was contended on behalf of the demanding State that, as the dates stated in the indictment were not material, he might have committed some or all of the crimes on the date he admitted he was in Tennessee. At page 197 (172 N. Y.), Judge O'BRIEN disposed of this contention as follows:

"It is suggested that since the relator was in the demanding state on the 2d day of July, 1901, for a few hours on a temporary errand of business, that he may have committed some or all of the crimes charged while there on that day, and that since the precise dates stated in the indictment are not material, it may be shown upon the trial that he actually did commit the crimes on that day and hence this court should send the relator to the demanding state for trial. The suggestion may possibly have the merit of ingenuity, but as a method of reasoning or argument, or as a judicial utterance in a case involving personal liberty, it is to be hoped that this court will not adopt it. The state of Tennessee and its agent were represented at the hearing upon the writ by able counsel. All the facts and circumstances constituting the alleged crimes were open to inquiry. It could have been shown that there

was or might have been a mistake in stating the dates in the indictment, or it could have been shown that the crimes were actually committed on the 2d day of July following, but nothing of the kind was claimed or even suggested. The demanding state, its agent and counsel, for some reason, elected to withhold all proof of the facts and circumstances of the alleged larcenies and to stand upon the bare recitals in the warrant. The *prima facie* proof that the state gave, consisting only of the recitals of the warrant, that the relator was personally present there at the dates named and committed the crimes, was superseded and removed by the solemn and conclusive admissions in open court that he was not there at the time, and consequently could not have fled from justice. When the prosecution alleges and proves a larceny committed at a designated time and place, and makes no claim that it was committed at any other time or place, and the accused then shows by conclusive proof that he was not in the state on the days designated, nor for a year before, nor for eight days after, and the case rests upon these facts alone, without any proof to justify even a suspicion that the crime was committed eight days after the date laid in the indictment, it would be a strange rule of law that would permit the case to go to the jury in order to procure a finding that, after all, the time laid in the indictment was a mistake and the crime was committed by the accused at the later date."

This Court took the same view when the case was before it *sub nom. Hyatt vs. Corkran*, 188 U. S., 691, saying, at page 711 :

"The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show

that he was not in the State at the time named in the indictments ; and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed."

It should be noted that each of the first five counts of the indictment charges the making of the conspiracy to have taken place *on a particular day* and not "*on or about*" a particular day, as was the case in some of the authorities upon which the defendant-in-error relies.

The sixth count charges that relator and Stewart "on or about the first day of January," 1913 * * * did falsely and fraudulently conspire, etc. The evidence affirmatively shows that relator was not in the State of New Jersey on January 1, 1913, nor until nearly six months thereafter.

HENRY GOLDSTEIN,

Attorney for Relator-Plaintiff-in-Error.

GEORGE W. WICKERSHAM,

ARTHUR C. PATTERSON,

of Counsel.

APPENDIX

In the Matter of the application of the Prosecutor of Hudson County to the Governor of New Jersey for a requisition upon the Governor of the State of Illinois for the rendition of J. Ogden Armour.

COPY OF OPINION BY THE GOVERNOR.

I have received a request from the Prosecutor of Hudson County for a requisition upon the Governor of the State of Illinois for the rendition of one J. Ogden Armour, who stands charged by indictment with the crime of conspiracy, alleged to have been committed in the County of Hudson, and who, as is alleged, to avoid prosecution, fled from the jurisdiction of this State and is now a fugitive from justice, being within the jurisdiction of the State of Illinois.

There is attached to the request an indictment found at the December Term, 1909, by the Grand Jury of Hudson County, the essential allegations of which are that the National Packing Company, Morris & Company, Swift & Company, Armour & Company, Hammond Packing Company and G. H. Hammond Company were and are corporations organized and existing under and by virtue of the laws of this State, and that during the days and times mentioned in said indictment each of them was and is engaged in the business of buying, selling and dealing in cattle, hogs, sheep and other live stock and the products thereof and like materials, and in manufacturing and preparing articles produced or resulting therefrom, and as well in the construction and maintenance of packing houses, cold storage houses and the like, and in buying, transporting and selling animal

and vegetable products ; that the said companies and their several directors, on the first day of March, 1908, at the City of Jersey City, unlawfully agreed to produce an artificial scarcity in the supply of meats and poultry and to enhance and increase the cost and price thereof, and on the said day did agree among themselves to create and control a monopoly of the meat and poultry supply in Jersey City, and wrongfully to raise and enhance the prices thereof by means in the said indictment more fully referred to; that in pursuance of this agreement, on the fourteenth day of December, 1908, certain persons, among them J. Ogden Armour, were elected as Directors of the National Packing Company, and that these companies and directors, among them J. Ogden Armour, did, in furtherance of said agreement, on the first day of March, 1908, "and thence continuously until the day of the presentation of this indictment at the city of Jersey City aforesaid," unlawfully maintain storehouses and cold storage plants for the storage of large quantities of meats and poultry, to the wrong and injury of the people at large.

This indictment, properly certified, is accompanied by the affidavit of Heinrich Stolte, who deposes that he is the chief steward of the steamship "Kaiser Wilhelm II," and that on the 28th day of April, 1908, J. Ogden Armour was a passenger on the steamship above mentioned and left the City of Hoboken on that day, sailing upon said ship to the City of Bremen, and that the said J. Ogden Armour was a passenger on the same vessel returning from Bremen on June 15th, 1908, and arrived in Hoboken about one week later. All the necessary accompanying affidavits and certifications are present.

There is in this State no legislation bearing strictly upon the procedure in interstate rendition, and I am to be guided, therefore, by the provisions of the Federal Constitution and the legislation of the Federal Congress in determining whether the desired demand upon the Governor of Illinois should, in the present instance, be made.

59

The Constitution of the United States, Article IV., paragraph 2, subdivision 2, provides as follows :

“ A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.”

Three essential facts, therefore, must appear to warrant the executive of a State to demand the delivery of an alleged fugitive by the executive of the asylum State :

1. A person must be charged in any State with treason, felony or other crime.
2. The person must have fled from justice.
3. The person so charged and who shall have fled must be found in another State.

It was soon found, after the adoption of the Federal Constitution, that this provision was not self-executing in that it specifies neither the authority upon whom the demand is to be made nor the form of the demand, nor the method to be pursued in recovering the fugitive. It was to provide for these omissions that the Federal Congress supplemented the constitutional provisions by legislation which, in its present form, is as follows :

“ Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any other State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit * * * charging the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to

be arrested * * * and to cause the fugitive to be delivered * * *."

It will be noted that this legislation adds no essential jurisdictional fact, but merely establishes a procedure by which not only the Governor of the State to whom such demand is addressed shall be guided in delivering the person whose rendition is sought, but also the procedure to be followed by the executive of the State from whom the demand issues.

In the present instance J. Ogden Armour is charged with conspiracy by an indictment which bears upon its face allegations which, if proven, would, in all probability, in a trial court be deemed sufficient, and therefore he is for the purposes of this procedure "charged with treason, felony or other crime." It is conceded that when sought to answer in person upon this indictment he is found within the State of Illinois. The question remaining to be considered is whether he has in fact fled from the justice of the State of New Jersey.

I can find no clearer or more satisfactory exposition of the necessary status of a fugitive from justice than that of Spear (*Law of Extradition*, p. 310):

"The next thing said is that he must be one 'who shall flee from justice.' To flee, says Dr. Worcester, is 'to run, to run from, to escape.' It is locomotion from a place to a place, and that too by the voluntary action of the person who flees. The man himself flees, and hence does not stay where he was. He is the agent of his own flight. This is the obvious and established sense of the word, and in this sense, and in no other, is it used in the Constitution. What the 'person' runs from or escapes from is the 'justice' of the State bringing the charge against him for a violation of its laws. He takes his body off beyond the reach of that 'justice.'

"Where does this 'person' go to in the conception of the Constitution? We have him on foot, or on

horseback, or in a rail car, fleeing from the State whose laws he has offended; and now where does he stop? He stops 'in another State'; and, hence, to the terms that describe the flight, the Constitution adds the words, 'and be found in another State.' The language is not 'who shall flee from justice *or* be found in another State,' but, 'who shall flee from justice, *and* be found in another State.' He is found there because he has fled to that State, and there paused in his flight, and there remains.

"What shall be done with this 'person' who has fled from one State to another? The Constitution says that he 'shall on demand of the executive authority of the State *from which he fled*, be delivered up to be removed to the State having jurisdiction of the crime.'

"The case, and the only case, for which the Constitution provides, is that of a person who is charged with crime in one State, and who flees to and is found in another State. This is the whole of the case. It may be that the provision is not broad enough to reach all the cases that ought to be reached; and if so, this would be a good reason for amending the constitution. But it is no reason for making the instrument say what it does not say. It is no reason for making the terms 'flee' and 'fled' mean an actual and voluntary escape by locomotion in one class of cases, and simply staying where one is, without locomotion, in another class of cases. It is no reason for adopting that sort of 'constructive rendering' which makes the same words mean exactly opposite things. This is assuming altogether too much for the flexibility of language. If we can thus trifle with the words of the Constitution, and force a meaning into them or out of them, at pleasure, in order to meet an exigency or attain a supposed good, then the instrument has no fixed meaning, and the interpreter becomes its maker."

To the same effect is *Moore on Extradition*, Vol. 2, pages 937-958.

Upon the proposition of so-called constructive pres-

ence as the basis of interstate rendition, the authorities are practically uniform in support of the principles stated. *In the Matter of Reggel*, 114 U. S., 642, Mr. Justice HARLAN said :

“Undoubtedly the Act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words the appellant was entitled, under the Act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process.”

See also *Corkran vs. Hyatt*, 172 N. Y., 176. Upon the affirmance of this case in the United States Supreme Court (188 U. S., 691), Mr. Justice PECKHAM said, speaking for the court :

“Thus the person who is sought must be one who has fled from the demanding state, and he must have fled (not necessarily directly) to the State where he is found. It is difficult to see how a person can be said to have fled from a State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in. He could omit to go to it. But how can it be said with accuracy that he has fled from a place in which he has not been present? This is neither a narrow nor, as we think, incorrect interpretation of the statute. It has been in existence since 1793 and we have found no case decided by this court wherein it has been held that the statute covered the case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the

act requires such presence and that it was not intended to include as a fugitive from justice of the State one who had not been in the State at the time when, if ever, the offence was committed, and who had not, therefore, in fact fled therefrom."

To the same effect are :

State vs. Jackson, 37 Fed. Rep., 258.

United States vs. Fowkes, 49 Fed. Rep., 50.

Hartman vs. Aveline, 63 Ind., 344.

Jones vs. Leonard, 50 Iowa, 106.

Wilcox vs. Nolz, 34 Ohio State, 520.

In re White, 55 Fed. Rep., 54-56.

In re Mitchell, 4 N. Y. Criminal Rep., 596.

It is essential, therefore, that to warrant a demand by the executive of this State upon the Governor of Illinois for the rendition of J. Ogden Armour it must appear that the said Armour was in fact within this State at the time of the commission of the alleged offence.

The indictment charges that certain persons named and certain corporations named, among those persons being J. Ogden Armour, "in the County of Hudson aforesaid, on the first day of March, in the year of our Lord one thousand nine hundred and eight, with force and arms, at the City of Jersey City aforesaid, in the county of Hudson aforesaid, and within the jurisdiction of this Court, wilfully, unlawfully and feloniously devising, contriving and intending, for their own unjust, excessive, immoral and unlawful profit and gain, to injure, defraud, prejudice, damage, cheat, impoverish and oppress the public and the people of the said city and of the said county of Hudson, * * * did, on the first day of March, in the year of our Lord one thousand nine hundred and eight, at the City of Jersey City aforesaid, in the county of Hudson aforesaid and within the jurisdiction of this Court, wilfully, unlawfully, immorally, fraudulently, extortionately, knowingly and corruptly, combine, unite, con-

federate, conspire and bind themselves together by agreement, &c." This is the allegation of the time, place and manner of the formation of the conspiracy. The indictment further alleges overt acts in furtherance thereof on the fourteenth day of December, 1908, in the city of Jersey City, in the said county of Hudson, by the election of J. Ogden Armour and others as directors of the National Packing Company; and further that in execution of the premises and in pursuance of the conspiracy, afterward, on the first day of March, 1908, and thence continuously until the day of the presentation of this indictment, did other acts therein alleged, which two latter charges relate to the overt acts done in furtherance of the unlawful combination previously made.

Thus the crime charged consists of two parts, the unlawful agreement and the overt act, separable and distinct as to time, except under the general charge of continuance to which I shall refer later. This distinction between the agreement and the overt act in pursuance thereof, is recognized and sustained by the United States Supreme Court in *United States v. Britton*, 108 U. S., 204. The Court said :

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

To the same effect are *Dealy v. United States*, 152 U. S., 539; *Bannon v. United States*, 156 U. S., 464; *United States v. Donau*, 11 Blatchford, 168.

In the broadest interpretation the status of J. Ogden Armour as a fugitive from the justice of this State depends upon his presence or absence in this

State at the time alleged as the formation of the unlawful combination or agreement or at the time of the overt act. I will consider each in turn.

There is no proof submitted that Armour was in fact in this State on the first day of March, 1908. So far as his presence in this State appears by matter of record he was in Hoboken for the purpose of taking passage on the Steamship "Kaiser Wilhelm II," leaving Hoboken for Bremen on the twenty-eighth day of April, 1908, and returned to Hoboken from Bremen on the same vessel, arriving sometime in the week following June 15, 1909. It was held in the Hyatt case that a subsequent appearance, unconnected by reasonable interference with the criminal act, was not sufficient to establish the status of fugitive. The effect to be given to this affidavit of presence I shall discuss later. It is sufficient to say here that the twenty-eighth of April is too remote from March first, without other circumstances appearing, to indicate personal participation in the agreement charged to have been formed on that earlier day.

With reference to the time stated as the date of the overt acts it would seem that the proof offered as to the presence of J. Ogden Armour within this state also fails to establish his character as a fugitive. The overt acts are recited to have occurred on the fourteenth day of December, 1908, and generally on each of the days between the first day of March, 1908, until the date of the finding of the indictment, that is, February 25th, 1910. With reference to the charge of an overt act upon the fourteenth day of December, 1908, the only specific reference to an overt act by time, the affidavit as to the presence of J. Ogden Armour fails to establish that he was as a matter of fact within this State on that date or at any time reasonably close thereto. The affidavit previously referred to of the Chief Steward of the Steamship "Kaiser Wilhelm II." is limited to the twenty-eighth day of April, 1908, and to the week following the fifteenth of June, 1909;

from which it would appear that J. Ogden Armour was as a matter of fact actually beyond the seas on the fourteenth day of December, 1908.

With reference to each of the specific dates fixed by the indictment, the proof fails to establish the character of a fugitive from justice in the person whose delivery is now sought.

The sole question which remains to be considered is whether under the general allegation of the indictment that the overt acts continued on each and every day from the first day of March, 1908, until the time of the finding of the indictment, the affidavit as to the presence of J. Ogden Armour in Hoboken is sufficient for the purposes of these proceedings.

I have previously referred to the case of *Corkran vs. Hyatt*. In this case the Court said :

“That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where, in a proceeding like this, there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictment, and that the dates named therein were erroneously stated, it is sufficient for the party charged to show that he was not in the State at the times named in the indictments.”

And further :

“The subsequent presence for one day, under the circumstances stated above, of the relator in the State of Tennessee, eight days after the alleged commission of the act, did not, when he left the State, render him a fugitive from justice within the meaning of the statute. There is no evidence or claim that he then committed any act which

brought him within the criminal law of the State of Tennessee, or that he was indicted for any act then committed. The proof is uncontradicted that he went there on business, transacted it and came away. The complaint was not made, nor the indictments found until months after that time. His departure from the State after the conclusion of his business cannot be regarded as a fleeing from justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight."

While it is perfectly true that upon the trial of the indictment if the State had by proper process obtained jurisdiction over the person of J. Ogden Armour, the prosecution would not be limited to the dates named in the indictment ; at the same time it must be considered as established, both by reason and authority, that the defendant is entitled to regard those dates as material for the purpose of establishing his status with reference to the extradition process, unless proof is offered that the crime was in fact committed at another date, of which he may have notice, or that his presence within the State with reference to any continuous crime at another date than that mentioned was under such circumstances as to establish the reasonable inference of his presence within the State for some purpose connected with the criminal act. Language in an indictment sufficient for purposes of trial may be too indefinite and general to form a basis for an extradition charge.

In 1904 the Governor of Missouri made a demand upon the Governor of New York for the apprehension of one William Ziegler, indicted for bribery of members of the legislature of the State of Missouri, with reference to which the then Attorney General of New York, the Hon. John Cunneen, in an opinion to the Governor of New York, said :

" It is claimed that although the indictment charges that the offence was committed on

the day of March, 1901, yet that the commission of the offence may be shown to have occurred at any time before the finding of the indictment and within the statute of limitations. It is probably true that under the Missouri statutes that claim is well founded. Section 2535 of the Revised Statutes of that State provides as follows :

“ ‘ No indictment shall be deemed invalid for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or an impossible day, or on a day that never happened.’

“ While the foregoing statute may be controlling upon the courts of Missouri upon the trial of a criminal action, the statute furnishes no warrant for the contention that the presence within the demanding State of a person accused of crime, at any time within the period prescribed for the limitation of actions, is enough to constitute him a fugitive from justice. * * *

“ While the statutes of Missouri declare either the promise or the giving of any money or other valuable consideration to any member of the Legislature with intent to influence his vote to be bribery, and while it is quite possible that upon a trial for bribery evidence of the promise at one date and of the payment of money at a subsequent date would be admissible, yet within the constitutional provision it is the plain duty of the demanding State to fix, at least within reasonable limits, the time within which it is charged that the crime was committed and to establish the presence of the accused in the demanding State within the period so fixed.”

The indictment in the present case fixes two dates as the time of specified criminal acts. The proof offered as to the presence of J. Ogden Armour within this State does not coincide with either of these dates within any reasonable

limits, and no proof being offered that the specified dates are not in fact correct, the general allegation of a continuance of the criminal acts practically for the entire period within which the statute of limitations might operate is neither sufficiently definite nor, in my judgment, reasonable for this purpose.

In a recent application to the Governor of New York for the rendition of Frank N. Hoffstot, upon the demand of the Governor of Pennsylvania, the Governor of New York said :

"In view of the statements in the presentment and those made upon the hearing before me, I must conclude that the charge that the accused, if surrendered, would be called upon to meet under the indictment is not limited to the third day of June, 1908, but would embrace an extended period, covering the months of May and June in that year. The first question then is whether whatever may be the fact as to the time to which the charge actually relates or the showing upon this point before the Executive of the State where the accused is found, the demanding State in a proceeding of this sort is absolutely bound by the date specified in the indictment. In an extradition proceeding, must the Executive determine the question whether the accused is a fugitive from justice solely with reference to that date? I do not so understand the law. Undoubtedly where there is nothing before the Executive to show that the charge relates to any other time he is justified in refusing to surrender the accused, if it clearly appears that on the date specified the accused was not within the demanding State."

And refers to the *Hyatt* case, from which I have previously cited.

The Governor of New York proceeded to say :

"The date alleged in the indictment is frequently selected arbitrarily. If there is no claim that the offense was committed at another time, of course the date al-

leged is the only time before the Executive, and he must make his decision accordingly. But if it satisfactorily appears that the charge relates to another time, and that the accused is a fugitive from justice, with respect to the actual charge there is no public policy in making it necessary to have a new indictment found with a more exact reference, in order that rendition should be had."

There is nothing in this statement inconsistent with the conclusions which I have reached. Whether the dates specified in the indictment have been arbitrarily fixed or otherwise, there is nothing before me to indicate that the charges have reference to any other dates or periods fixed with reasonable exactness; that those dates were erroneously fixed, or that if an effort should be made to find a new indictment, other dates would, in fact, be fixed as the correct dates to which the charges would necessarily have reference. The general allegation of a continuing offense for a period covering practically a period of the statute of limitations, does not seem to me to come within the meaning of a "satisfactory appearance" that the charge relates to another time.

But even if it should be conceded that the general allegation is sufficient and that the State is entitled to rest upon this indefinite statement, the affidavits submitted as to the presence of J. Ogden Armour within this State during the period alleged as the continuance of the criminal act, do not establish his presence within the State under conditions which refute the possibility of his non-participation in the furtherance of the criminal agreement. The affidavit goes no further than the bare fact that on the twenty-eighth day of April, 1908, J. Ogden Armour sailed from Hoboken for Bremen, and was a passenger on the same vessel returning from Bremen on the fifteenth day of June, 1909, landing in Hoboken about one week later. In all the

cases which I have considered, in which it was attempted to show that the presence of a certain person within a State has reference to participation in a criminal act, where on one side it was attempted to impute participation in a criminal act, and, on the other, to show that such presence was merely casual or in the course of business in no way connected with the criminal act, the facts appearing of record have been much more complete, sufficient at any rate, to raise a question argumentatively as to whether such presence was or was not in fact under such circumstances that participation in a criminal act was at least a reasonable inference. Such was the situation in the Hyatt case, to which I have previously referred, as well as in the Ziegler case before the Governor of New York, in which case rendition was refused. So, too, in the Vinal case, reported in 2 *Moore on Extradition*, pp. 570-579, and in the *Hoffstot* case, recently before the Governor of New York. Mr. Hoffstot himself was called as a witness before the Governor and testified at length as to his visits to Pittsburgh and the purposes of those visits. In the present instance the proof is barren of any facts from which any inference could be drawn as to the purpose of the visit of J. Ogden Armour to Hoboken except that of taking passage upon the transatlantic vessel and of returning therefrom. To attach to such condition of presence within this State—the inference of participation in the criminal act charged in the indictment is, it seems to me, impossible, in view of the cases in which the courts have refused to consider the presence of an individual within a state as connected with a criminal act, when the details of such visits, their duration and their character have been clearly exhibited.

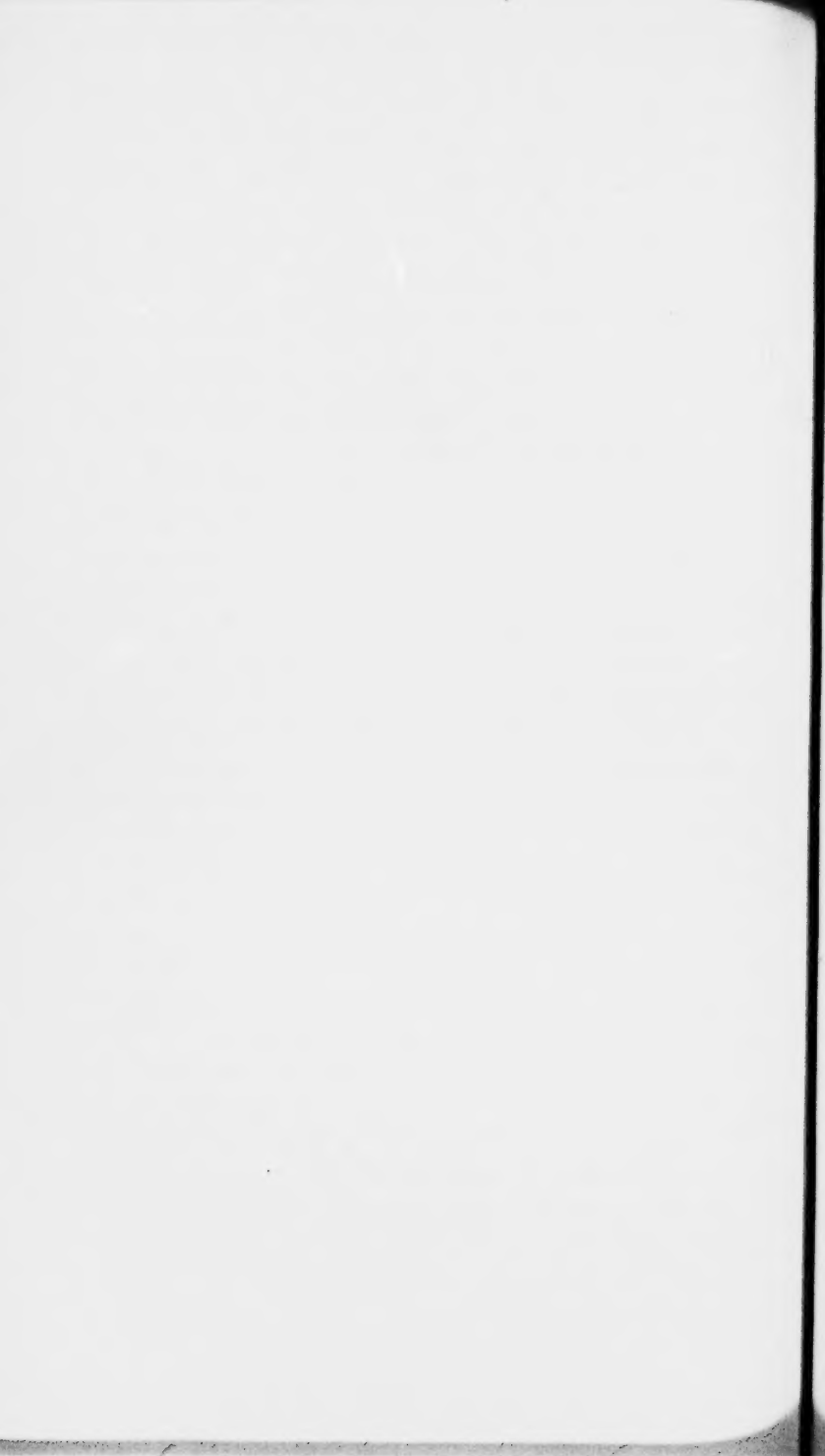
It was suggested at the hearing on this application by the Prosecutor of the County of Hudson, that the Governor should not treat this application as he would treat an application for the surrender of an alleged fugitive from justice from another state upon requisition upon him by

the Governor of that other state. I am at a loss to see the difference in principle. The same rule of law should control an applying Governor in issuing a requisition that governs the action of the Governor in surrendering a fugitive upon the demand of another state. It would be useless to issue a requisition upon the Governor of another state with which he would not be legally justified in complying.

I conclude, therefore, that J. Ogden Armour is not a fugitive from the justice of this State with reference to this indictment, and for this reason decline to issue the demand upon the Governor of Illinois.

JOHN FRANKLIN FORT,
Governor.

May 6, 1910.



Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. JOHN D. IRELAND,

Relator-Plaintiff-in-Error,

vs.

ARTHUR WOODS, Police Commissioner of
the City of New York,

Defendant-in-Error.

No. 611.

October Term, 1917.

In Error to the Court of Appeals of the State of
New York.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

HENRY GOLDSTEIN,

Attorney for Relator-Plaintiff-in-Error.

GEORGE W. WICKERSHAM,

ARTHUR C. PATTERSON,

Of Counsel.



In the Supreme Court of the United States,

OCTOBER TERM, 1917.

THE PEOPLE OF THE STATE OF NEW
YORK, EX REL. JOHN D. IRELAND,
Relator-Plaintiff-in-Error,

VERSUS

ARTHUR WOODS, Police Commis-
sioner of the City of New York,
Defendant-in-Error

No. 611
October Term, 1917.

ERROR TO COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

In its second point, the defendant-in-error has devoted considerable space to the discussion of a point now raised for the first time, namely, to state it concretely, that the State of New York had the right, independently of the Federal Constitution and laws, to surrender the plaintiff-in-error, and that it must be deemed to have exercised this power.

The case below proceeded solely upon the theory that the plaintiff-in-error was apprehended and restrained of his liberty because of the federal law. The warrant of the governor of New York (page 6) recites a demand made upon him by the governor of New Jersey, "pursuant to the Constitution and laws of the United States," for the delivery

of plaintiff-in-error to the demanding state and on the trial, counsel for defendant-in-error showed that this was his theory of the case. At page 9 of the record Mr. Richter, of counsel for defendant-in-error, said :

“ The question before your Honor is, whether the Governor had any evidence before him to warrant him in issuing this warrant. In other words, the question is, as to whether the relator was charged with a crime in the State of New Jersey ; and secondly, whether he was actually in the State at the time the crime was committed ” (page 9).

The opinion of the Appellate Division (page 104) shows that the case proceeded there upon the same theory, and while no opinion was written in the Court of Appeals, the only questions argued there were those arising under the Federal Constitution and Laws. At no time heretofore has it been urged that the warrant issued by the governor in the case at bar could be supported on the theory that the State had inherent power to apprehend the plaintiff-in-error, and that his rendition could actually be predicated upon an exercise of that power.

The brief period which has elapsed since the service of the brief of defendant-in-error makes it impossible for us to critically examine the questions of constitutional law, as to the powers granted or reserved by the states, suggested by counsel for defendant-in-error, in time to submit a full brief at this hearing, and should the Court deem those questions worthy of any consideration, we respectfully request an opportunity to prepare and file a further brief.

We may point out, however, that there is authority for the position that a state has no reserved power to surrender a fugitive. In *Hyatt vs. Corkran*, 188 U. S., 691, the question, while not expressly raised, was impliedly decided. There the State Court set aside a warrant issued by

the governor, and ruled that he was without authority to grant it, and this in the face of the statute relied upon by defendant-in-error as an expression of the power of the state to make voluntary surrender (Code Crim. Pro., § 827). If the State had such a power, by virtue of that statute, the warrant should have been sustained. But this Court affirmed the decision of the Court of Appeals, and said, at page 719 :

" We are of opinion that as the relator showed without contradiction and upon conceded facts that he was not within the State of Tennessee at the times stated in the indictments found in the Tennessee court, nor at any time when the acts were, if ever committed, he was not a fugitive from justice within the meaning of the Federal statute upon that subject, *and upon these facts the warrant of the governor of the State of New York was improperly issued.*" (Italics ours.)

In *Innes vs. Tobin*, 240 U. S., 127, 130, this Court said :

" For the purpose of the solution of the inquiry under this heading we treat the following proposition as beyond question * * * (c) That the act of 1793 (now Rev. Stat., § 5278) was enacted for the purpose of controlling the subject in so far as it was deemed wise to do so, and that its provisions were intended to be dominant and so far as they operated controlling and exclusive of state power * * * .

" Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State * * * ."

Further, Section 827 of the Code of Criminal Procedure of the State of New York, cited by defendant-in-error, is *pro-*

cedural only. It does not attempt to define any crime. It merely provides what procedure is to be taken *when* a person "is to be arrested, as a fugitive from justice". It does not undertake to specify the cases in which a person is to be arrested as such fugitive. It presupposes that such cases have been specified in some command of substantive law. As there is no other provision of state law specifying the cases in which a person "is to be arrested, as a fugitive from justice". Those cases must be specified in the Federal law, which is the only law upon the subject.

Assuming that the State has the inherent power to surrender a person to another State, its will to exercise this power would have to be expressed in some provision of law, presumably a statute. There is no such statute in New York, and it is shown that Section 827 does not express that will, but merely directs the procedure which is to be taken in a case where a person "is to be arrested, as a fugitive from justice".

It follows that, assuming the inherent right contended for by defendant-in-error, there is no provision of law in the State of New York for its exercise.

HENRY GOLDSTEIN,

Attorney for Relator-Plaintiff-in-Error.

GEORGE W. WICKERSHAM,

ARTHUR C. PATTERSON,

Of Counsel.

MAR 2 1918

JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. JOHN D. IRELAND,

Relator-Plaintiff-in-Error,

vs.

ARTHUR WOODS, Police Commissioner of
the City of New York,

Defendant-in-Error.

No. 611.

October Term, 1917.

In Error to the Court of Appeals of the State of
New York.

Brief of Plaintiff-in-Error in Opposition to Motion to Dismiss for Want of Jurisdiction.

HENRY GOLDSTEIN,
Attorney for Relator-Plaintiff-in-Error.

GEORGE W. WICKERSHAM,
ARTHUR C. PATTERSON,
Of Counsel.



SUBJECT INDEX.

PAGES

Interstate Rendition—*Habeas Corpus*—Error to
Highest State Court—Jurisdiction of the Supreme
Court.

Argument in opposition to motion to dismiss for
want of jurisdiction..... 1 to 13

I. Writ of error is the proper proceeding to
bring up for review in this Court the final
order or judgment of the New York Court of
Appeals in a *habeas corpus* proceeding..... 1 to 8

1. There is drawn in question the validity
of a warrant of the Governor of New York,
on the ground of repugnancy to a law of
the United States (U. S. R. S., Sec. 5278),
and a decision in favor of its validity
has been rendered 2 to 3

2. The warrant is an "authority exercised
under any State," within the meaning of
U. S. R. S., Sec. 1214, as amended..... 3 to 8

II. The judgment of the New York Court of
Appeals is reviewable, because the said Court
had jurisdiction to review the federal question
presented..... 8 to 13

1. The local law allows an appeal to the
Court of Appeals as of right from orders
finally determining special proceedings,
and *habeas corpus* is a special proceeding.. 8 to 9

2. The jurisdiction of the Court of Appeals is
confined to questions of law; the issue
in the case at bar—who are fugitives from
justice within the meaning of U. S. R. S.,
Sec. 5278—is a pure question of law..... 9 to 13

Appendix :

Excerpts from Code of Civil Procedure.....14 to 17

Excerpts from Code of Criminal Procedure.....17 to 19

Alphabetical List of Cases.

	PAGES
Biddinger v. Comm'r of Police, 245 U. S., 128.....	9
City of New York, Matter of, 200 N. Y., 536.....	12
Hyatt v. Corkran, 188 U. S., 691.....	10
Innes v. Tobin, 240 U. S., 127.....	7
People <i>ex rel.</i> Corkran v. Hyatt, 172 N. Y., 176.....	4
Poel v. Brunswick-Balke-Collender Co., 216 N. Y., 310....	11
Robb, <i>In re</i> , 19 Fed., 26.....	6
Robb v. Connolly, 111 U. S., 624.....	4, 6
Smith, <i>Ex parte</i> , 3 McLean, 121 ; 22 Fed. Cas., 12,968....	6
Taylor v. Taintor, 16 Wallace, 366.....	6

In the Supreme Court of the United States,

OCTOBER TERM, 1917.

THE PEOPLE OF THE STATE OF NEW
YORK, *ex rel.* JOHN D. IRELAND,
Relator-Plaintiff-in-Error,

VERSUS

ARTHUR WOODS, Police Commis-
sioner of the City of New York,
Defendant-in-Error.

No. 611.
October Term, 1917.

ERROR TO COURT OF APPEALS OF THE STATE OF NEW YORK.

**BRIEF OF PLAINTIFF-IN-ERROR IN OPPO-
SITION TO MOTION TO DISMISS FOR
WANT OF JURISDICTION.**

Defendant-in-error moves to dismiss the writ for want of jurisdiction upon two grounds: (1) that the judgment of the New York Court of Appeals is not reviewable here on writ of error, but only, if at all, by *certiorari*; (2) that the judgment is not reviewable because under the local law of the State of New York, the Court of Appeals had no jurisdiction to review the alleged federal question sought to be presented.

Neither of these points is well taken.

I. Writ of error is the proper proceeding to bring up for review in this Court the final order or judgment of the Court of Appeals in a *habeas corpus* proceeding.

Section 1214, Rev. Stats. U. S. (Jud. Code, Sec. 237, as amended by Act September 6, 1916, Sec. 2), provides as follows :

" A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.

" It shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity ; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is

either in favor of or against the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority " (39 Stat., 726, 727).

The writ of error here was based on that portion of the foregoing Act which provides for the issuance of a writ of error where there "is drawn in question the validity of * * * an authority exercised under any State, on the ground of their being repugnant to the Constitution * * * or laws of the United States, and the decision is in favor of their validity."

The imprisonment or restraint of which the relator complains is justified by the respondent under a warrant issued by the Governor of the State of New York (fols. 7-15). This warrant was issued under Sec. 827 of the Code of Criminal Procedure [copy annexed, *infra*, p. 17], which prescribes what is to be done in case a requisition for the extradition of a fugitive is made by the Governor of a demanding State upon the Governor of New York, and reference to this section of the Code of Criminal Procedure is made in the warrant (fols. 7-8). That section (827) provides, in part :

"It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant or temporary resident of this state is to be arrested, as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment * * * charging such person with treason, felony or crime in such state or territory), to issue and transmit a warrant for such purpose" (in the case of New York City) "to the superintendent or any inspector of police. * * * The officer to whom is directed and intrusted the execution of the governor's warrant must, within thirty days of its date * * * return the same * * *."

The warrant under which the relator is held in this proceeding was therefore an exercise of an authority of the State in that it was issued by the Governor, pursuant to the provisions of Section 827 of the State law cited above.

In *People ex rel. Corkran v. Hyatt*, 172 N. Y., 176, 188, CULLEN, J., said :

"It has been held by the Supreme Court of the United States in *Robb v. Connolly* (111 U. S., 624) that the governor of a state in the execution of the duty of surrendering fugitives imposed by the Constitution and the statute of Congress does not act as a United States officer and that a writ of *habeas corpus* may be issued by the state courts to test the validity of an arrest under his warrant."

In *Robb v. Connolly*, 111 U. S., 624, it appeared that one Bayley was arrested in California as a fugitive from justice and delivered to Robb, who had been empowered by the Governor of Oregon, the demanding State, as the agent of that State, to receive him and convey him to Oregon for trial. The arrest was made pursuant to a warrant issued by the Governor of California. Bayley sued out a writ of *habeas corpus* in the State Court, and Robb made return that he held Bayley pursuant to the above warrant, as the agent of the State of Oregon, but refused to produce the body of Bayley in Court, on the ground that the State Court had no right to proceed. Robb was adjudged guilty of contempt of Court and committed to jail. He thereupon obtained a writ of *habeas corpus* from the State Court, which was dismissed in the highest Court of the State ; subsequently he obtained a writ of error from the Supreme Court of the United States to review the action of the State Court.

It was claimed on behalf of Robb that the Constitution and laws of the United States were paramount, so as to exclude jurisdiction in the State Courts, and in particular (see page 634) that by virtue of the extradition law he, as agent

of the State of Oregon, was an officer of the United States, "wielding the authority and executing the power of the nation."

The Supreme Court affirmed the State Court, saying, at page 634 :

" We are all of opinion that he was not such an officer, but was and is an agent of the State of Oregon, invested with authority to receive, in her behalf, an alleged fugitive from the justice of that State. By the very terms of the statute under which the executive authority of Oregon demanded the arrest and surrender of the fugitive, he is described as the 'agent of such authority.' It is true that the executive authority of the State in which the fugitive has taken refuge, is under a duty imposed by the Constitution and laws of the United States, to cause his surrender upon proper demand by the executive authority of the State from which he has fled. It is equally true that the authority of the agent of the demanding State to bring the fugitive within its territorial limits, is expressly conferred by the Statutes of the United States, and, therefore, while so transporting him, he is, in a certain sense, in the exercise of an authority derived from the United States. But these circumstances do not constitute him an officer of the United States, within the meaning of former decisions. He is not appointed by the United States, and owes no duty to the National Government, for a violation of which he may be punished by its tribunals or removed from office. His authority, in the first instance, comes from the State in which the fugitive stands charged with crime. He is, in every substantial sense, her agent, as well in receiving custody of the fugitive, as in transporting him to the State under whose commission he is acting. What he does, in execution of that authority, is to the end that the violation of the laws of his State may be punished. The fugitive is arrested and transported for an offense against her laws, not for an offense against the United States."

Everything that is here said of the agent of the demanding State applies with equal force to the Governor of the asylum State.

In *Taylor v. Taintor*, 16 Wall., 366, the Court, referring to cases of interstate rendition, said, at page 370 :

"In such cases the governor acts in his official character, and represents the authority of the State in giving efficacy to the Constitution of the United States and the law of Congress."

It is true that the fugitive, when arrested in the asylum State is also restrained "by color of the authority of the United States" (R. S., Sec. 753), so that Federal Courts have concurrent jurisdiction to examine into the cause of detention on *habeas corpus* (*Ex parte Smith*, 3 McLean, 121), as the Constitution and the Federal Statute create a condition precedent which must be fulfilled before the Governor can exercise the authority of the State; for without the constitutional authority, statutory provisions authorizing the Governor to cause the arrest of a fugitive, would operate to deprive him of liberty without due process of law. But the authority that apprehends and restrains the fugitive is nevertheless the authority of the State.

A very interesting exposition of this doctrine is found in Spear on Extradition, 2nd Edition, pages 504, *et seq.*; and by the same author in 29 Albany L. J., 206. In these articles, Mr. Spear criticizes the decision of the Circuit Court in *Robb v. Connolly* (*sub nom. In re Robb*, 19 Fed., 26), which was reversed, as above stated, in 111 U. S., 624, and the doctrine established as herein set forth.

The liability of a person charged in any State with treason, felony or other crime, to be arrested in another State and delivered by the executive authority thereof to the demanding State, is limited and regulated by the provisions of Article IV, Section 2, of the Constitution, and the provisions of Section

5278 of the United States Revised Statutes, by virtue of which provisions, before a person so charged can be extradited from one State to another, it must appear that he is a fugitive from justice, within the meaning of the provisions of the Constitution and the statute.

The authority exercised by the Governor in the case at bar was duly drawn in question on the ground that it was repugnant to the Constitution and the laws of the United States, specific reference being made to the provisions claimed to be infringed (fol. 5).

In *Innes v. Tobin*, 240 U. S., 127, which was a writ of error to the Court of Criminal Appeals of the State of Texas to review a final order in a *habeas corpus* proceeding brought to discharge from an arrest for the purposes of extradition, the Court said (p. 130) :

"Broadly, there is but a single question for consideration, was the order for rendition repugnant to the Constitution and the provisions of the statute? But two inquiries are involved in its solution: First, was the rendition order void because under the facts there was no power to award it except by disregarding express prohibitions or requirements of the Constitution or statute, or by necessary implication adversely affecting rights thereby created; and, Second, even although this was not the case, was the order nevertheless void because under the circumstances it dealt with a situation which by the effect of the statute was taken out of the reach of state authority even although no express provision was made in the statute for dealing with such condition by any authority, state or federal?"

And after reviewing the provisions of the Constitution and statute, the Court further said (p. 131) :

"Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication prohibited

the surrender of a person in one State for a removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State. * * * From this it results that the first inquiry here is, did it appear that the accused was a fugitive from the justice of the State of Georgia?"

The cases cited clearly establish the fact that the arrest of a person on a Governor's warrant pursuant to the request of the Governor of a sister State, for the purpose of extradition, is an exercise of authority under a State statute and where, as here, there arises an inquiry whether or not in the particular instance that authority is not being exercised in repugnance to the Constitution or laws of the United States and the decision is in favor of its exercise, it may be reviewed in this Court on writ of error.

II. The defendant in error confuses limitations upon the power of the New York Court of Appeals to look into disputed questions of fact which have been determined by the unanimous affirmance of the court of first instance by the Appellate Division of the Supreme Court, with the lack of *jurisdiction to entertain the appeal*.

The appeal to the Court of Appeals was taken March 16, 1917. The statutes regulating the jurisdiction of the Court of Appeals of the State of New York then in force provided as follows (Code of Civil Procedure) :

"SEC. 190. (Am'd, 1895.) The jurisdiction of the court of appeals in civil actions.

"* * * From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases, and no others :

"1. Appeals may be taken as of right to said court,

from judgments or orders finally determining actions or special proceedings * * *.

* * * * *

"SEC. 191. Limitations, exceptions and conditions.

"The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions :

* * * * *

"The jurisdiction of the court is limited to a review of questions of law.

"4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.

The Constitution of the State of New York, Article VI., Section 9, provides :

"No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals."

Concededly, however, the Court of Appeals had jurisdiction to review all questions of law arising in a special proceeding. A proceeding by writ of *habeas corpus* is, under the laws of the State of New York, a special proceeding (Code Civ. Proc., ch. 16, tit. 2). The provisions of the statute material to a decision of the present question are hereto annexed (*infra*, pp. 14-17).

Appeal lies to the Appellate Division from the final order in such a proceeding, and, as has been shown above, to the Court of Appeals from the final order of the Appellate Division.

The ultimate question for decision—the question which this court in the very recent case of *Biddinger v. Commissioner of Police*, 245 U. S., 128, held to be open for decision on

habeas corpus—was whether or not the plaintiff in error was a fugitive from justice. The determination of this question depended upon whether or not he was within the State of New Jersey at the time it was charged that he committed the crimes for which he was indicted and thereafter departed from that State; but in order to determine what the time was when the alleged crimes were committed, the Court was called upon to construe, first, the papers which were submitted to the Governor on the application, and second, the indictment. As has been shown in the principal brief filed on behalf of the plaintiff in error in this Court, the authorities of the demanding State did not claim, in the papers whereby they set the Governor's process in motion, that relator had been within the State of New Jersey when the alleged crime was committed, but on the contrary, that he, "to avoid prosecution, has kept himself without the jurisdiction of this State and is now a fugitive from justice" (p. 88), and that

"while the said J. D. Ireland, on the said twelfth day of July, nineteen hundred and thirteen, was not personally present in the place where said crime is alleged to have been committed in the said County of Atlantic, his co-conspirator, the said Charles Stewart, was personally present at said place and carried out by performance the said conspiracy that had been previously arranged and entered into between the said Ireland and the said Stewart, which said conspiracy was to be consummated in said place in Atlantic County; that since the commission of said crime the said Ireland has kept himself without the State of New Jersey and is now in the State of New York. * * *" (p. 100).

In *Hyatt v. Corkran*, 188 U. S., 691, 713, PECKHAM, J., said:

"It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that

State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present?"

The New Jersey authorities used language advisedly when they charged plaintiff in error with having "*to avoid prosecution*" "*kept himself without the jurisdiction of*" the State of New Jersey and the fundamental question presented was whether by that avoidance he made himself a fugitive from justice. This was a question of law which was specifically raised at the Special Term (pp. 9, 10); it was argued at the Appellate Division and in the Court of Appeals.

The question whether or not the brief visits made by the plaintiff in error to the State of New Jersey were during the time when the alleged conspiracy was in operation, *i. e.*, while the alleged crime was being committed, depended upon the construction of the indictment, whether it charged a continuing conspiracy or not, and if it did, how long it showed the conspiracy to have had continuance. These were questions of law. They were raised at the Special Term, argued in the Appellate Division and in the Court of Appeals. They were within the jurisdiction of the Court of Appeals to determine. That court, while fully respecting the limitations upon its jurisdiction created by the State Constitution, had, nevertheless, held that it was not deprived by the Constitution of jurisdiction to determine questions of law involved in the determination of an ultimate question of fact. Thus in *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y., 310, it was held, as stated in the headnote:

"An unanimous affirmance by the Appellate Division of findings of the trial court, that a contract alleged in the complaint was made, does not preclude the Court

of Appeals from reviewing the question whether there was a contract between the parties, where it is evident that the contract, which the findings declare to exist, is based upon the letters or writings which passed between the parties and these letters are included in the findings. The question of law, whether these writings constitute a contract, and if so, whether they satisfy the provisions of the Statute of Frauds, survives the unanimous decision of the Appellate Division, and is subject to review by this court."

And in a concurring opinion in *Matter of Application of the City of New York, etc.*, 200 N. Y., 536, 546, Chief Judge CULLEN used the following language :

" We hold that a unanimous affirmance by the Appellate Division of a judgment based on findings of fact imports a unanimous determination that the findings of fact are supported by the evidence. We also hold that the constitutional provision applies to special proceedings as well as to actions and, therefore, in any special proceeding where there are findings of fact those findings are conclusive upon this court. But there are many special proceedings in which no findings of fact are made, but a mere decision is found. If we construe the constitutional provision as strictly limited to its language, the cases last mentioned would not fall within the provision at all. We have not, however, so construed it, but have applied the constitutional rule to special proceedings where an examination of the case showed that the order was based on the decision of questions of fact. It cannot, however, be extended to cases where it is apparent the decisions have proceeded on questions of law. Otherwise it would be impossible to review final orders in special proceedings where no findings of fact were made, because in nearly all such cases it is theoretically possible to imagine facts which justified the decisions below, although it is apparent that the decisions proceeded solely on questions of law. An inspection of the record in this case shows that the award was not based on any determination as to the

value of the land taken free and clear from incumbrance, but on the theory that the conveyances of the plaintiff had incumbered the land so as to practically destroy its value. Whether those conveyances had the effect given them presents a question of law."

In the case at bar, an inspection of the record shows that the decisions of the State Supreme Court at both Special Term and in the Appellate Division were based upon (1) a construction of the New Jersey indictment—a pure question of law, and (2) the determination by the Special Term that, as a matter of law, while a brief presence of the accused within the demanding State during the period of continuance of the alleged crime for a purpose disconnected with it, would not afford the necessary basis for a finding that he was a fugitive from justice, a stay over night was not "brief." These questions were reviewable in the Court of Appeals and are open to decision in this Court.

The principal brief filed on behalf of the plaintiff in error presents more fully the various questions of law which were raised in the Court of Appeals and in the Courts below and which are submitted to the review of this Court. It is confidently submitted that the Court of Appeals had jurisdiction to review the decision of the Appellate Division, and that the case is properly before this Court on writ of error to review the decisions of all of the State Courts.

HENRY GOLDSTEIN,

Attorney for Relator-Plaintiff-in-Error.

GEORGE W. WICKERSHAM,

ARTHUR C. PATTERSON,

Of Counsel.

Appendix.

The following are provisions from the New York Code of Civil Procedure, 1916.

" SEC. 2015. *Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.*

" A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretense, is entitled, except in one of the cases specified in the next section, to a writ of *habeas corpus*, or a writ of *certiorari*, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of *habeas corpus* may be issued and served under this section, on the first day of the week, commonly called Sunday ; but it cannot be made returnable on that day."

" SEC. 2019. *Contents of petition.*

" The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true ; and must state in substance :

" 1. That the person in whose behalf the writ is applied for is imprisoned or restrained in his liberty ; the place where, unless it is unknown, and the officer or person by whom, he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

" 2. That he has not been committed, and is not detained by virtue of any judgment, decree, final order or process, specified in Sec. 2016 of this act.

" 3. The cause or pretense of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

" 4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition ; unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before

the application, a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person, having the prisoner in his custody, and that the copy was refused.

" 5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists. (See Sec. 2033.)

" 6. It must specify whether the petitioner applies for the writ of *habeas corpus*, or for the writ of *certiorari*."

" SEC. 2026. *Return ; its contents.*

" The person upon whom either writ has been duly served must state, plainly and unequivocally, in his return :

" 1. Whether or not, at the time the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

" 2. If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced, and exhibited to the court or judge.

" 3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given, if the original is no longer in his hands ; and that the return must state particularly to whom, at what time, for what cause, and by what authority, the transfer was made.

" The return must be signed by the person making it, and, unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath."

" SEC. 2031. *Proceedings on return of habeas corpus.*

" The court or judge before which or whom the prisoner is brought by virtue of a writ of *habeas corpus*, issued as prescribed in this article, must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint or for the continuance thereof is shown; whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause."

" SEC. 2039. *Prisoner may controvert return; proofs thereupon.*

" A prisoner, produced upon the return of a writ of *habeas corpus* may, under oath, deny any material allegation of the return, or make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Thereupon, the court or judge must proceed, in a summary way, to hear the evidence, produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires."

" SEC. 2043. (*Am'd. 1913.*) *When discharge to be granted; when proceedings to cease.*

" If it appears, that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings. * * *"

" SEC. 2058. *When appeal may be taken in cases under this article.*

" An appeal may be taken from an order refusing to grant a writ of *habeas corpus*, or a writ of *certiorari*, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. Where the final order is made, to discharge a prisoner, upon

his giving bail, an appeal therefrom may be taken, before bail is given ; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except as prescribed in this section."

The following is a provision from Cook's Criminal Code :

"SEC. 827. *To be delivered up by the governor, on demand, etc.*

"It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant or temporary resident of this state is to be arrested, as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment or information from the authorities of such other state or territory, charging such person with treason, felony or crime in such state or territory), to issue and transmit a warrant for such purpose to the sheriff of the proper county or his under sheriff, or in the cities of this state (except in the City and County of New York, where such warrant shall only be issued to the superintendent or any inspector of police) to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction shall be competent to make service of or execute the same. The governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and entrusted the execution of the governor's warrant must, within thirty days from its date, unless sooner requested, return the same and make return to the governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this state, or of any city, county, town or village thereof, must, upon request of the governor, furnish

him with such information as he may desire in regard to any person or matter mentioned in this chapter.

"2. Before any officer to whom such warrant shall be directed or entrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the governor of this state, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the supreme court, or a county judge, who shall, in open court if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the governor thereon, he or they may have a writ of *habeas corpus* upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said court or a judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the governor, and one of the judges aforesaid or a counselor at law of this state, and such waiver shall be immediately forwarded to the governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against, and mentioned in the requisition, the accompanying papers and the warrant issued by the governor thereon, then the court or judge shall order and direct the officer intrusted with the execution of the said warrant of the governor to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant thereon, as the agent or agents upon the part of such state to receive him or them ; otherwise to be discharged from custody by the court or judge. If upon such hearing the warrant of the governor shall appear to be defective or improperly executed, it shall be by the court or judge returned to the governor, to-

gether with a statement of the defect or defects, for the purpose of being corrected and returned to the court or judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

"3. It shall not be lawful for any person, agent or officer to take any person or persons out of this state, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings aforescribed, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this state, for the purpose of taking him or sending him to another state, without a requisition first duly had and obtained, and without a warrant duly issued by the governor of this state, served by some officer as in this section provided, and without, except in case of waiver in writing as aforesaid, taking him before a court or judge as aforesaid, unless in pursuance to the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats or undue influence, persuade any citizen, inhabitant or temporary resident of this state to sign the waiver of his right to go before a court or judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction be sentenced to imprisonment in a state prison or penitentiary for the term of one year. Any wilful violation of this act by any of the above-named officers shall be deemed a misdemeanor in office." (Amended by L. 1886, ch. 638 ; L. 1895, ch. 880.)



JULIE D. FRELAND

ARTHUR WOODS, Police Commissioner of the City of
New York

IN ERROR TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS BRIEF AND
ARGUMENT IN SUPPORT THEREOF

EDWARD SWANN
District Attorney of the
County of New York

Boston S. J. [unclear]
Assistant District Attorney
George F. [unclear]
Deputy Assistant District Attorney
Council for Defendants in Error

February, 1917

Resume of Grounds of Motion.

- I. The judgment of the New York Court of Appeals is not reviewable by writ of error. It may only be reviewed, if at all, by *certiorari*.
- II. The judgment of the New York Court of Appeals is not reviewable at all—because, by virtue of the limitation of the jurisdiction of the said Court of Appeals imposed by Art. VI, § 9 of the Constitution of the State of New York, the said Court of Appeals was prohibited from reviewing the question whether there was any evidence to sustain the finding of the Special Term that the accused was a fugitive from justice, a finding which commingled fact and law and was equivalent to a general verdict. This because the proceeding at the Special Term involved the determination of an issue of fact, and the order of the Special Term having been unanimously affirmed by the Appellate Division of the Supreme Court, the Court of Appeals was, hence, precluded from reviewing the question or deciding whether there was any evidence to sustain the finding. Hence, the Court of Appeals did not decide the alleged Federal question, and, consequently, the judgment of that court is not reviewable here.

Table of Cases.

	PAGE
Abbott v. Tacoma Bank, 175 U. S. 409....	10
Adams v. Russell, 229 U. S. 353.....	30
Amherst College v. Ritch, 151 N. Y. 282...	18
Bachtel v. Wilson, 204 U. S. 36.....	29, 30
Bartlett v. Goodrich, 152 N. Y. 421.....	18
Becker v. McCrea, 193 N. Y. 423.....	19
Bethell v. Demaret, 10 Wall 537.....	10
Biddinger v. Police Commr., 245 U. S. 128.	24
Champion Lumber Co. v. Fisher, 227 U. S. 445	10
Cons. El. Storage Co. v. Atlantic Trust Co., 161 N. Y. 605	17, 18, 22, 26
Cuyahoga Power Co. v. North'n Realty Co., 244 U. S. 300	30
De Saussure v. Gaillard, 127 U. S. 216....	29
Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157	29
Fayerweather v. Ritch, 195 U. S. 276...18, 20, 26	
Foreman v. Meyer, 227 U. S. 452	10
Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152	19
Johnson v. Risk, 137 U. S. 300	29
Kennedy v. Mineola H. & F. T. Co., 178 N. Y. 508	13
Kissam v. U. S. Printing Co., 199 N. Y. 76, 13, 15, 19	
Leathe v. Thomas, 207 U. S. 93	29
Linford v. Ellison, 155 U. S. 503	10
McGuire v. Bell Telephone Co., 167 N. Y. 208	13, 15
McLean v. Denver & Rio Grande R. R. Co., 203 U. S. 38	10

	PAGE
Marden v. Dorthy, 160 N. Y. 39.....	13, 15, 17, 18
Middleton v. Whitridge, 213 N. Y. 499.....	14
Millingar v. Hartupee, 73 U. S. 258.....	10
Missouri Pac. Ry. Co. v. Taber, 244 U. S. 200	28
Ogden v. Alexander, 140 N. Y. 356	17
People v. Bresler, 218 N. Y. 567.....	14
People v. Bright, 203 N. Y. 261.....	13
People v. Cummins, 209 N. Y. 283	15
People v. Griswold, 213 N. Y. 92	14, 15
People v. Lambrix, 204 N. Y. 261.....	13, 15
People v. Maggiore, 189 N. Y. 514.....	13, 15
People v. Mingey, 190 N. Y. 61.....	13, 15
People v. Sheffield-Farms Co., 206 N. Y. 79, 13, 15	13, 15
People v. Thompson, 198 N. Y. 396.....	13, 15
People ex rel. Broadway Imp. Co. v. Bar- ker, 155 N. Y. 322.....	15, 20, 22
People ex rel. Bungart v. Wells, 57 App. Div. 140	23
People ex rel. Danziger v. House of Mercy, 128 N. Y. 180	3, 24
People ex rel. Evans v. McEwen, 67 How. Pr. [N. Y.] 105	3
People ex rel. Gamaldi v. Warden, 160 App. Div. 480	3, 24
People ex rel. Genna v. McLaughlin, 145 App. Div. 513	24
People ex rel. Hayes v. Waldo, 212 N. Y. 156	13, 16, 20, 22 25
People ex rel. Loughran v. Railroad Comms., 158 N. Y. 421	16
People ex rel. Man. Ry. Co. v. Barker, 152 N. Y. 417	13, 15, 16, 20, 21, 23, 25, 26
People ex rel. Perkins v. Moss, 187 N. Y. 410	23

People ex rel. Sands v. Feitner, 173 N. Y. 647	13, 16, 23, 24
People ex rel. Stephenson v. Bingham, 205 N. Y. 168	13, 14, 16, 20, 22, 25
People ex rel. Woodbury v. Hendrick, 215 N. Y. 339	21
Phila. & Reading Iron Co. v. Gilbert, Oct. Term, 1917, No. 454	9
Porter v. Municipal Gas Co., 220 N. Y. 152	14, 15
Reed v. McCord, 160 N. Y. 330	13, 15, 21
Rochester L. Co. v. Stiles & P. Co., 135 N. Y. 209	17
Snow v. United States, 118 U. S. 346	10
South Carolina v. Seymour, 153 U. S. 353.	10
Supervisors of Monroe v. Clark, 92 N. Y. 391	17
Sweringen v. St. Louis, 185 U. S. 38	10
United States v. Lynch, 137 U. S. 280	10
Western Union Telegram Co. v. Wilson, 213 U. S. 52	29

Constitution and Statutes.

	PAGE
U. S. Const., Art. IV, § 2.....	2
N. Y. Const., Art. VI, § 9.....	1, 6, 12, 14, 21
U. S. Jud. Code, §237 [As am'd. Act of Sept. 6, 1916, 39 Stat., L. 726]....	7, 11, 12, 27
N. Y. Code Crim. Pro., § 827	2
N. Y. Code Civ. Pro., § 1022	16
N. Y. Code Civ. Pro., § 1997	20
N. Y. Code Civ. Pro., §§ 2031, 2039 ...	3, 24, 25
N. Y. L. 1894, Chap. 688	16, 17, 18
N. Y. L. 1903, Chap. 85	18

Supreme Court of the United States

OCTOBER TERM, 1917.

JOHN D. IRELAND,
Plaintiff-in-error,

against

ARTHUR WOODS, Police Commissioner of the City of New York,

Defendant-in-error.

No. 611

MOTION TO DISMISS

NOW comes the Police Commissioner of the City of New York, the defendant-in-error, and moves that the writ of error be dismissed for lack of jurisdiction, on the following grounds:

I. The judgment of the New York Court of Appeals is not reviewable in this court on writ of error. It is only reviewable, if at all, by *certiorari*.

II. It is not reviewable at all—because by virtue of the limitation of the jurisdiction of the Court of Appeals of the State of New York imposed by the local law, to wit, Art. VI, § 9 of the Constitution of the State of New York, the said Court of Appeals, upon the appeal thereto, had no jurisdiction to review or decide the question whether there was any evidence tending to show that the prisoner was a fugitive from justice—the alleged Federal question sought to be presented. Consequently, the Court of Appeals must be deemed not to have passed upon or to have decided the question whether or not the prisoner was a fugitive from justice. And, hence, this Court is without jurisdiction.

The Proceedings Below.

Before taking these points up for specific consideration it is proper that we should set forth a brief statement of the essential facts and proceedings below—in the light of their bearing on the present motion.

The plaintiff-in-error (hereinafter called the prisoner) was taken into custody under a rendition warrant issued by the Governor of the State of New York in pursuance of a demand by the Governor of the State of New Jersey, made under the Federal Constitution and laws. The warrant of the Governor of New York directed the arrest of the prisoner and (after compliance with the requirements of the local statutes—N. Y. Code Crim. Pro., § 827) his surrender to the State of New Jersey (Warrant, Record, 6).

The prisoner sued out a writ of *habeas corpus* in the Supreme Court of the State. In his petition for the writ he claimed that he was unlawfully restrained of his liberty in violation of Art. IV, § 2, subd. 2 of the United States Constitution, alleging, in substance, that the Governor of the State of New York had no jurisdiction to issue the warrant, in that it did not appear before him that the petitioner was a fugitive from the justice of the State of New Jersey or had fled therefrom; that it nowhere appeared that the petitioner was personally within the limits of the State of New Jersey at the time the alleged crimes were stated to have been committed; and that he was not within the limits of the State of New Jersey at any of the times when the crimes charged in the indictment or any of them were committed (Record, 5).

The Police Commissioner, upon whom the writ was served, made return to the writ, setting forth the Governor's warrant as the cause of detention (Record, 7).

The prisoner filed a traverse to the return, (1) alleging, in substance, that the indictment, upon which the requisition was based and the rendition warrant issued, charged him with the crime of conspiracy, fraud and obtaining money under false pretenses "on the 1st day of January, 1913; the 9th day of June, 1913, and the 12th day of July, 1913," (2) denying that he was within the State of New Jersey at the times mentioned in the indictment, and (3) alleging that he was not within the State of New Jersey at any such times, nor at any of the times when the alleged crimes were committed, nor at the time of the finding of the indictment, and that he was not a fugitive from the State of New Jersey and had not fled from that State (Record, 7-8).

—Under the local practice, the petition is regarded as an *ex parte* application to procure the issuance of the writ. It is *functus officio* when the writ is issued. The inquiry is limited to the issues raised by the return and traverse—which constitute, so to speak, the pleadings [*People ex rel. Danziger v. House of Mercy*, 128 N. Y. 180, 185, 189; *People ex rel. Gamaldi v. Warden*, 160 App. Div. 480, 481; *People ex rel. Evans v. McEwen*, 67 How. Pr. (N. Y. 105, 111; N. Y. Code Civ. Pro., §§ 2031, 2039]. It will be noticed that the TRAVERSE contains no allegation that there was a lack of evidence *before the Governor of New York* to show that the accused was a fugitive from justice. The statement to that effect in the petition was eliminated from the traverse. We do not, however, lay any undue stress upon

technicalities of pleading. We refer to it in passing. And it is a fact worthy of notice. The ACTUAL ISSUE tendered by the prisoner and litigated was whether or not he was within the State of New Jersey at the time when any of the alleged crimes were committed.

The writ was returnable at a Special Term of the Supreme Court (Record, 4). Issue was joined by the filing of the traverse, and the following occurred:

“*Mr. Patterson* [counsel for the prisoner]: If your Honor please, I have prepared here a traverse, which I have not had a chance to have verified, which shows that the relator was not within the State of New Jersey at the time any of the alleged crimes were committed.

The Court: Is that the point to be raised in these proceedings?

Mr. Patterson: Yes, sir.

* * * * *

Mr. Patterson: Of course it is not necessary for me to say that I will submit authorities to show that the Court has ample authority to review the matter *de novo*.” (Record, 9.)

Thus, there was tendered for decision a specific issue of *fact*.—It was tried and determined.

The prisoner’s counsel put in evidence a copy of “the requisition of the Governor of the State of New Jersey and the papers annexed thereto” (Record, 9). Among these papers was the indictment; and evidence was taken concerning the prisoner’s presence in or absence from the State of New Jersey—with reference to the times laid in the indictment (Record, 9 *et seq.*).

The charge was conspiracy. The indictment contained six counts. The time laid in the first

count was July 12th and "on or about July 12th," 1913. The time laid in the second, third and fourth counts was July 12th, 1913. The time laid in the fifth count was June 9th, 1913. The time laid in the sixth count was "on or about the first day of January, in the year of our Lord one thousand nine hundred and thirteen, and on divers other days between that day, and the day of the taking of this Inquisition." The caption of the indictment showed that the inquisition was taken "In the Atlantic County Court of Oyer and Terminer, January Term, in the year of our Lord, one thousand nine hundred and fourteen" (Indictment, Record, 89-98).

The court [Special Term] having heard the evidence, dismissed the writ of *habeas corpus* and ordered that the prisoner be remanded, with directions to the Police Commissioner to surrender him to the authorized agent of the State of New Jersey (Order, Record, 4).

—It is not pertinent to this motion to state the evidence. It will be stated in the brief on the merits. The present motion is, indeed, based, in one of its main features, upon the proposition that the Court of Appeals was prohibited from reviewing or deciding the question whether there was any evidence to support the finding or determination of the Special Term that the prisoner was a fugitive from justice—that the facts existed which warranted the conclusion that he was a "fugitive from justice."

The prisoner appealed to the Appellate Division of the Supreme Court of the State of New York. That court *unanimously* affirmed the order of the lower court—Special Term (Order of App. Div., Record, 103).

The prisoner then appealed to the Court of Appeals from the order entered upon the decision of the Appellate Division. The Court of Appeals affirmed the order without opinion.

After the affirmance by the Court of Appeals the prisoner took a WRIT OF ERROR to this court. This writ was allowed by the Chief Judge of the New York Court of Appeals. It was directed to the COURT OF APPEALS.

The present motion is a motion to dismiss the writ of error—for the reasons stated. These reasons we shall now proceed to consider—after first setting forth the specific Federal question claimed to be involved.

The "Federal Question."

The Federal question involved in this case, notwithstanding that an effort might be made to disguise it by bringing into prominence one or other of its incidental features, inevitably reduces itself, upon analysis, to the question whether there was any evidence to warrant a finding that the prisoner was in the demanding State at the time of the commission of the alleged crime and, hence, a fugitive from justice—or, treating the question as to whether a person is a "fugitive from justice" as involving, in its ultimate analysis, a legal conclusion, it was whether there was any evidence that the facts existed which justified the legal conclusion that the prisoner was a fugitive from justice.

That question was one which, we contend, the Court of Appeals *could not* and, hence, *did not* review—N. Y. Const., Art. VI, § 9.

But apart from that, and assuming that the alleged Federal right, privilege or immunity set up was reviewed by the Court of Appeals and that its decision involved a denial thereof, we contend the case is not properly here on WRIT OF ERROR—that the judgment of the State court can only be reviewed by *certiorari*.—Act of Sept. 6, 1916, 39 Stat., L. 726.

These propositions we shall now proceed to consider—taking them in inverse order.

Brief and Argument in Support of Motion.

I. The jurisdiction of this court to review the judgment of a State court is defined by Jud. Code, § 237, as amended by the Act of Congress of September 6, 1916 [Chap. 448, 39 Stat. L. 726], which reads as follows:

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

To authorize this court to review upon WRIT OF ERROR a final judgment of a State court, it must appear either:

1. That (a) there was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and (b) that the decision was *against* their validity, or;

2. That there was (a) drawn in question the validity of a statute of, or an authority exercised under, a State (b) on the ground of their being repugnant to the Constitution, treaties or laws of the United States and (c) a decision *in favor* of their validity.

—If there was drawn in question the validity of a treaty, or a statute of, or an authority exercised under, the United States, and the decision

was *in favor of* their validity, or if there was drawn in question the validity of a statute of, or an authority exercised under, a State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was *against* their validity, the judgment may be brought here by *certiorari*.

Phila. & Reading Iron Co. v. Gilbert,
Oct. Term, 1917, No. 454.

1. It is obvious that the present case does not come within the purview of the FIRST PROVISION. There was not drawn in question the validity of a treaty or statute of, or an authority exercised under, the UNITED STATES, and there was not a decision against their validity.

2. Nor does the case come within the purview of the SECOND PROVISION. There was not (a) drawn in question the *validity* of a *statute* of, or an *authority* exercised under, a State within the meaning of the second provision of the statute; and (b) there was not a *decision* by the Court of Appeals in favor of their validity.

As respects an "authority exercised under a State," it is the *validity* of the *authority*, and not the question whether the facts shown justified its exercise in the particular case, that constitutes the Federal question.

In the case at bar the authority of the Governor of New York to perform the function of inter-state rendition was not questioned. Indeed, the existence *before him* of the facts necessary to justify his action in the particular case was not, in any legal mode, brought before the courts of New York for decision. But waiving that for the moment, and assuming that the ex-

istence of the facts to warrant the exercise of the power in the particular case was challenged, and that the exercise of the authority in the particular case was upheld, that would not, we submit, bring the case within the purview of the second provision. It is the authority, or, so to speak, the existence of the power in the abstract—the power of the functionary to act at all in respect of the subject matter—that must be challenged, and not the sufficiency of the facts to warrant its exercise in the particular case, in order that a Federal question may be presented reviewable on writ of error under this provision of the statute. In short, the *validity* of the *authority* must be directly challenged—it is not enough that an erroneous exercise of it was claimed on the facts appearing—to raise a Federal question of *this* class.

South Carolina v. Seymour, 153 U. S. 353, 358-360.

United States v. Lynch, 137 U. S. 280, 285.

Snow v. United States, 118 U. S. 346, 352-353.

Abbott v. Tacoma Bank, 175 U. S. 409, 412-413.

Sweringen v. St. Louis, 185 U. S. 38, 44, 45, 46.

Linford v. Ellison, 155 U. S. 503, 508.

Millingar v. Hartupee, 73 U. S. 258, 261, 262.

Bethell v. Demaret, 10 Wall 537, 540.

McLean v. Denver & Rio Grande R. R. Co., 203 U. S. 38, 48.

Champion Lumber Co. v. Fisher, 227 U. S. 445, 451, 452.

Foreman v. Meyer, 227 U. S. 452, 455.

The distinction is like that between jurisdiction, or the power to act at all in respect of the subject matter, and the "exercise of jurisdiction" or the application of the abstract power to a concrete state of facts claimed to fall within the general power and to warrant its exercise. It is the jurisdiction that may be challenged, not an erroneous exercise thereof.

Under Jud. Code, § 237 prior to its amendment this court had jurisdiction to review on WRIT OF ERROR a judgment of a State court when it appeared:

3. That (a) a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of or commission held or authority exercised under the United States and (b) that there was a decision against the title, right, privilege, or immunity especially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

Since the amendment, however, that question is no longer reviewable by writ of error, but only by *certiorari*.—And the decision is so reviewable when it is either *in favor of or against* the title, right, privilege or immunity.

It is obvious, then, that the present case can only be considered with reference to the THIRD PROVISION. Hence, the judgment of the Court of Appeals is not reviewable by writ of error—for, assuming that the prisoner, at the proper time and in the proper way, set up and claimed a right, privilege or immunity under the Constitution or statutes of the United States—a right or privilege not to be surrendered, or an immunity against surrender—and that there was a *decision* against it by the Court of Appeals, the judgment of the State Court is, since the

amendment of Jud. Code, § 237, reviewable only by *certiorari*, and not by WRIT OF ERROR.

II. But assuming (1) that the case may be considered with reference to the second provision, and (2) that, with reference to the third provision, it may be brought here on WRIT OF ERROR, there is another ground which, we contend, defeats the jurisdiction of this court; and this is one which involves a consideration of the local law of New York concerning the jurisdiction of the New York Court of Appeals. This we shall now proceed to consider. It may be said, as foreshadowing the argument, that it is our contention that there was no *decision* by the New York COURT OF APPEALS upon the alleged Federal question presented—and this because the Court of Appeals was *precluded* by the Constitution of the State of New York from *reviewing* or *deciding* that question.

The Constitution of the State of New York, Art. VI, § 9, specifically provides that:

“No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.”

This provision went into effect on Jan. 1, 1896.

It is a direct limitation of the jurisdiction of the Court of Appeals. In general terms, the jurisdiction of the Court of Appeals is (except where the judgment is of death—in which case the appeal goes directly to that court and it has power to review the facts) limited to the review of questions of *law* (N. Y. Const., Art. VI, § 9). The question whether there is *any* evidence to

sustain a finding of fact or a verdict is, it is true, in its essential nature, a question of *law*. But it is the one question of law, the jurisdiction to review which is—when the affirmance by the Appellate Division is *unanimous*—taken away from the Court of Appeals (*People ex rel. Stephenson v. Bingham*, 205 N. Y. 168, 169-170; *Kennedy v. Mineola H. & F. T. Co.*, 178 N. Y. 508, 512-513). The Court of Appeals is *precluded* from reviewing it.

This provision of the State Constitution being an express limitation of the jurisdiction of the Court of Appeals, it has been rigidly enforced and applied—both in civil and criminal cases, in special proceedings, as well as in actions.

People ex rel. Man. Ry. Co. v. Barker,
152 N. Y. 417, 430 *et seq.*

Marden v. Dorthy, 160 N. Y. 39.

Reed v. McCord, 160 N. Y. 330.

McGuire v. Bell Telephone Co., 167 N.
Y. 208, 211.

People ex rel. Sands v. Feitner, 173 N.
Y. 647.

People v. Maggiore, 189 N. Y. 514.

People v. Mingey, 190 N. Y. 61, 65.

People v. Thompson, 198 N. Y. 396, 399.

Kissam v. United States Printing Co.,
199 N. Y. 76, 78.

People v. Bright, 203 N. Y. 261, 263.

People v. Lambrich, 204 N. Y. 261, 263.

People ex rel. Stephenson v. Bingham,
205 N. Y. 168, 169-170.

People v. Sheffield-Farms Co., 206 N. Y.
79, 80, 81-82.

People v. Cummins, 209 N. Y. 283, 296.

People ex rel. Hayes v. Waldo, 212 N.
Y. 156, 162.

People v. Griswold, 213 N. Y. 92, 96.

Middleton v. Whitridge, 213 N. Y. 499,
505-506.

Porter v. Municipal Gas Co., 220 N. Y.
152, 161.

Cardozo, *Juris. Ct. App.*, §§ 54 *et seq.*

There must be borne in mind clearly the difference between the jurisdiction of the Court of Appeals to entertain an appeal in a given case and its jurisdiction to review and decide a particular question sought to be presented to it upon that appeal. The question whether an appeal lies to the Court of Appeals from a judgment or order is a very different question from that of the power of the Court of Appeals, upon an appeal properly before it, to review and decide a particular question (*vid. People v. Bresler*, 218 N. Y. 567, 570-571). An appeal may lie to the Court of Appeals from a final judgment or order—notwithstanding that the affirmance by the Appellate Division was unanimous. But upon such appeal the Court of Appeals has no jurisdiction to review or decide the question whether there was any evidence to support a finding of fact or a non-directed verdict (*vid. Middleton v. Whitridge*, 213 N. Y. 499, 505-506)—because, notwithstanding that that is a question of law, it is the one question of law which, when the judgment or final order was *unanimously* affirmed by the Appellate Division, the Court of Appeals is, by the mandate of the Constitution (N. Y. Const., Art. VI, § 9 *supra*) prohibited from reviewing (*People ex rel. Stephenson v. Bingham*, 205 N. Y. 168, 169-170).

The rule has been applied in:

Civil actions tried before a jury:

- Reed v. McCord*, 160 N. Y. 330.
McGuire v. Bell Tel. Co., 167 N. Y. 208,
 211.
Porter v. Municipal Gas Co., 220 N. Y.
 152, 161.

Criminal actions tried before a jury:

- People v. Maggiore*, 189 N. Y. 514.
People v. Mingey, 190 N. Y. 61, 65.
People v. Thompson, 198 N. Y. 396, 399.
People v. Lambrix, 204 N. Y. 261, 263.
People v. Cummins, 209 N. Y. 283, 296.

Civil actions tried before the court or before
 a referee without a jury:

- Marden v. Dorthy*, 160 N. Y. 39, 45-46.
Kissam v. U. S. Printing Co., 199 N. Y.
 76, 78

Criminal actions tried before a court without
 a jury—for example, misdemeanor prosecutions
 before Courts of Special Sessions held by three
 justices without a jury.

- People v. Sheffield-Farms Co.*, 206 N. Y.
 79, 80, 81-82.
People v. Griswold, 213 N. Y. 92, 96.

Special proceedings tried before a referee or
 before the court without a jury:

- People ex rel. Man. Ry. Co. v. Barker*,
 152 N. Y. 417, 430.
People ex rel. Broadway Imp. Co. v.
Barker, 155 N. Y. 322, 324.

Proceedings tried and determined before administrative officers reviewed at the Appellate Division by *certiorari*:

People ex rel. Stephenson v. Bingham,
205 N. Y. 168.

People ex rel. Hayes v. Waldo, 212 N.
Y. 156, 162.

*People ex rel. Loughran v. Railroad
Comms.*, 158 N. Y. 421, 430.

Proceedings to review the decisions of administrative officers in which, by law, the Supreme Court may, upon evidence taken before it, in proceedings instituted by *certiorari*, examine and decide the facts *de novo*.

People ex rel. Man. Ry. Co. v. Barker,
152 N. Y. 417, 430 *et seq.*

People ex rel. Sands v. Feitner, 173 N.
Y. 647.

The application of this UNANIMOUS AFFIRMANCE RULE to certain classes of cases tried before a referee or before the court without a jury deserves some special consideration.* Prior to the enactment of L. 1894, Chap. 688, which amended Code Civ. Pro., § 1022, the court or referee (in civil actions tried without a jury) was required to state separately the facts found and the conclusions of law. By L. 1894, Chap. 688, there was introduced what was commonly called the "short form" of decision, by which the necessity for doing that was abrogated. While the statute permitting the decision to be in the "short form" remained in force, the Court of Appeals,

* The Court's attention is respectfully called to the learned and authoritative treatise "JURISDICTION OF THE COURT OF APPEALS," §§ 54 *et seq.*, by Mr. Cardozo—now a judge of the Court of Appeals.

after the adoption of the unanimous affirmance rule in the Constitution of 1894 [in effect Jan. 1, 1896], was prohibited from determining whether the facts necessary to support the legal conclusions upon which the judgment depended existed. It could not *review* or decide that question.

Marden v. Dorthy, 160 N. Y. 39, 45-46.
Cons. El. Storage Co. v. Atlantic Trust Co., 161 N. Y. 605, 610-611.

Before the statute permitting the short form of decision was enacted (L. 1894, Chap. 688), the Court of Appeals, if the appeal came up on the judgment roll only (to which was annexed the findings of fact and conclusions of law—but not the evidence) could determine whether the facts found [together with those admitted by the pleadings] justified the conclusions of law upon which the judgment depended (*Rochester L. Co. v. Stiles & P. Co.*, 135 N. Y. 209, 211-212). If a case had been made and settled, the court could, for the purpose of affirming a judgment, but not for the purpose of reversing it, look into the evidence and determine whether it warranted additional facts to those expressly found, and necessary to support the legal conclusions (*Ogden v. Alexander*, 140 N. Y. 356, 362; *Supervisors of Monroe v. Clark*, 92 N. Y. 391, 397); and, prior to the adoption of the unanimous affirmance rule in the Constitution,* it could, notwithstanding the unanimous affirmance, review and determine the question whether there was any evidence to support the findings of fact necessary to sustain the judgment.

When, after the enactment of L. 1894, Chap. 688, the decision was in the "short form," the

* This took effect Jan. 1, 1896.

Court of Appeals could, *before the adoption of the Constitutional provision*, look into the evidence and determine whether there was *any* evidence to support the facts which would justify the legal conclusions upon which the judgment depended. The short form decision was regarded as the equivalent of a general verdict (*Amherst College v. Ritch*, 151 N. Y. 282, 320) [Cf. *Fayerweather v. Ritch*, 195 U. S. 276, 302]. But, *after the adoption of the UNANIMOUS AFFIRMANCE RULE in the Constitution*, the effect of the statute permitting the short form decision, *together with the constitutional provision*, was, by requiring the Court of Appeals to assume that all the facts necessary to sustain the judgment existed, to *prohibit* the Court of Appeals from reviewing the question whether there was even any evidence to sustain the facts upon which the legal conclusions depended. It was prohibited from reviewing the question whether the legal conclusions had support in the facts (*Amherst College v. Ritch*, 151 N. Y. 282, 320-321; *Bartlett v. Goodrich*, 153 N. Y. 421, 424; *Marden v. Dorothy*, 160 N. Y. 39, 45-46; *Cons. El. Storage Co. v. Atlantic Trust Co.* 161 N. Y. 605, 610-611). The general form of the decision made it equivalent to a general verdict (*Cons. El. Storage Co. v. Atlantic Trust Co. supra*)—which commingles fact and law.

By L. 1903, Chap. 85, the decision in the “short form” was abolished and Code Civ. Pro., § 1022 was amended so as to make necessary the statement of findings of fact and conclusions of law—in those cases in which, prior to the enactment of L. 1894, Chap. 688, such was the practice. This was a reversion to the old practice.—The UNANIMOUS AFFIRMANCE RULE of the Constitution,

however, remained, and still remains, in force.—Consequently, *where specific findings of fact and conclusions of law were required* by the statute, the effect of the constitutional provision was (when there was a unanimous affirmance by the Appellate Division) to prohibit the Court of Appeals from reviewing or determining whether there was even any evidence to sustain the findings of fact;—but the Court of Appeals was empowered to review and decide the question whether the *facts found* (together with those admitted by the pleadings) justified the legal conclusions upon which the judgment depended (*Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152; *Becker v. McCrea*, 193 N. Y. 423, 426).

Thus, the present situation of the law, with respect to civil actions tried before a referee or before the court without a jury, is that in cases in which *specific findings of fact are required* to be made, the Court of Appeals, after an unanimous affirmance by the Appellate Division, is precluded from determining whether there is any evidence to support the facts found; but it may review the question of the legal sufficiency of those facts (together with those admitted by the pleadings) to warrant the legal conclusions and the judgment founded thereon.

Kissam v. U. S. Printing Co., 199 N. Y. 76, 78.

Becker v. McCrea, 193 N. Y. 423, 426.

In proceedings in which *specific findings of facts are not required*, the effect of the unanimous affirmance provision of the Constitution is to prohibit the Court of Appeals from reviewing and determining whether even there is any evidence to support the facts giving rise to the legal conclusions upon which the validity of the

judgment or determination depends. The situation is the same as that in which there was a general verdict; the decision is tantamount to a finding in favor of the successful party of all the facts necessary to sustain the judgment or order [Cf. *Fayerweather v. Ritch*, 195 U. S. 276, 302]; and the Court of Appeals is prohibited from reviewing the question whether there is *any* evidence to sustain it.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417, 435-436.

People ex rel. Stephenson v. Bingham, 205 N. Y. 168, 169.

People ex rel. Hayes v. Waldo, 212 N. Y. 156, 162.

Of such a nature is a proceeding by *habeas corpus*; and especially so in a case of interstate rendition such as this—where the Special Term tries, *de novo*, an issue of fact and makes summary disposition of the case—by a general finding.

The term “finding of fact,” as used in the Constitution, includes general as well as specific findings—those “implied from the nature of the decision” as well as those specifically found and stated *in extenso* (*People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 434, 435-436; *People ex rel. Broadway Imp. Co. v. Barker*, 155 N. Y. 322, 324); and the word “decision” for this purpose embraces both judgments and final orders (*People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 434-436).—“The final determination of the rights of the parties to a special proceeding instituted by State writ is styled a final order” (Code Civ. Pro., § 1997).

Now, it is true, that we do not point to a specific case in which this rule has been applied in

a proceeding instituted by *habeas corpus*.* We have, however, demonstrated the universality of the rule embodied in the Constitution and its rigid application.

And a few words concerning the *status* of the Court of Appeals in the judicial system of New York would here seem to be a fitting preface to what we are about to say. The Court of Appeals is essentially a court of error. It was constituted, as respects its existing jurisdiction, not to give individual suitors their rights, but to settle the law. In the judicial system of New York the Appellate Division of the Supreme Court is, in a broad view, looked upon as the court of last resort for individual litigants. The Court of Appeals is limited to the review of pure questions of law, and appeals lie to it for the sole purpose of placing it in a position to settle the law of the state. When the provision respecting its jurisdiction was adopted in the Constitution of 1894 it had come to be seen that there was *one* question of *law* which, while analytically and technically such, involved, in its essence, the *facts* of the particular case, and, accordingly, it was specifically ordained that (although it was a question of law) "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals."

Reed v. McCord, 160 N. Y. 330, 333
et seq.

People ex rel. Man. Ry. Co. v. Barker,
152 N. Y. 417, 429 *et seq.*

* Issues of fact do not often arise in such proceedings—although they may upon occasion (*People ex rel. Woodbury v. Hendrick*, 215 N. Y. 339).

Cons. El. Storage Co. v. Atlantic Trust Co., 161 N. Y. 605, 611.

The effect of this provision is that, when the judgment or order was *unanimously* affirmed by the Appellate Division, the Court of Appeals is prohibited, in cases where specific findings of fact are not required to be made, from reviewing the question whether there is any evidence to support the facts necessary to warrant the legal conclusion involved in the verdict, general finding or determination upon which the judgment or final order depends.—And the provision is rigidly applied.

We have seen that the UNANIMOUS AFFIRMANCE RULE of the Constitution applies to criminal cases tried before a jury; and to criminal cases tried before the court *without a jury*, in which there is a *general finding of guilt*. Its effect in such cases is to prohibit the Court of Appeals from reviewing or determining whether the facts exist which constitute the defendant's guilt of the crime of which he was convicted. In a larceny case, for example, the Court of Appeals is prohibited from reviewing or determining whether the facts existed which warranted the legal conclusion of his guilt of the crime of larceny as defined by the statute.

We have seen that the rule applies to the determinations in proceedings tried before administrative boards or officers in which there is a general finding and determination.

People ex rel. Stephenson v. Bingham,
205 N. Y. 168, 169.

People ex rel. Hayes v. Waldo, 212 N. Y.
156, 162.

*People ex rel. Broadway Imp. Co. v.
Barker*, 155 N. Y. 322, 324.

It likewise applies in proceedings in which the Supreme Court is empowered by law to review the decisions of administrative officers and to examine and decide the facts *de novo* upon evidence taken before it on *certiorari*.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417, 434-436.

People ex rel. Sands v. Feitner, 173 N. Y. 647, 649.

Equally within the scope of the rule (for it is universal in its application and admits no exceptions) are proceedings on *habeas corpus*—if *issues of fact are involved*; * and this is peculiarly clear in a proceeding instituted by *habeas corpus* to test the validity of a contemplated surrender in interstate rendition—where there is involved the decision of the question of *fact* whether the prisoner was or was not within the demanding state at the time of the commission of the alleged crime, or, at the time the crime is alleged to have been committed, and is, hence, a fugitive from justice.

The ordinary function of a writ of *habeas corpus*, in the State of New York, is to test the jurisdiction of the court or officer to issue the process of detention. And this is determined from an examination of the proceedings before the functionary issuing the process (*People ex rel. Bungart v. Wells*, 57 App. Div. 140, 147, 149, 151; *People ex rel. Perkins v. Moss*, 187 N. Y. 410).

IN INTER-STATE RENDITION CASES, however, the practice, both in the State and Federal courts is to permit a prisoner held in custody under a rendition warrant to try before the court, in the

* The rule applies *wherever* an issue of *fact* was involved.

habeas corpus proceeding, the issue—an issue of *fact*—whether or not he was in the demanding State at the time of the commission of the alleged crime and, thus, whether or not he was a fugitive from justice (*People ex rel. Genna v. McLaughlin*, 145 App. Div. [N. Y.] 513; *Biddinger v. Police Commr.*, 245 U. S. 128).

In one aspect this procedure is anomalous—because it virtually transfers to the judiciary the performance of an executive function. It is the practice, however; and it has the sanction of decision (*Biddinger v. Police Commr.*, 245 U. S. 128; *People ex rel. Genna v. McLaughlin*, 145 App. Div. [N. Y.] 513)—and the fact that it is the practice materially strengthens our position.

The present case proceeded at the Special Term of the Supreme Court upon the specific theory that the Special Term could try and determine the issue of *fact* whether or not the prisoner was in the demanding state at the time of the commission of the alleged crime—or at the time the crime was alleged to have been committed. Not only was that the specific issue raised by the return to the writ of *habeas corpus*, and the answer and traverse thereto,* but it was specifically stated to be the issue involved and tendered [*vid. ante*, p. 4] (Record, 9).

The proceeding is very closely assimilated to that instituted by the kindred process of *certiorari* to review the determination of an adminis-

* In New York the issues in the *habeas corpus* proceeding are confined to those raised by the traverse to the return (*People ex rel. Danziger v. House of Mercy*, 128 N. Y. 180, 187, 189; *People ex rel. Gamaldi v. Warden*, 160 App. Div. 480, 481; N. Y. Code Civ. Pro., §§ 2031, 2039). The petition is *functus officio* after the writ is issued. The process returned, if valid upon its face, establishes *prima facie* that the imprisonment is lawful.

trative official or board (*People ex rel. Hayes v. Waldo, supra*; *People ex rel. Stephenson v. Bingham, supra*); and, particularly, to that in which provision is made by statute in New York that in proceedings by *certiorari* to review the decision of a board of commissioners respecting tax assessments the court may, upon evidence taken *de novo* before it, examine into and decide the questions of fact which were before the administrative functionaries, and, upon such evidence, decide anew the issues of fact before it for review. The close similarity between such a proceeding and a proceeding by *habeas corpus* in an inter-state extradition case (where the power of *de novo* review is made to depend on statute construed so as to permit it) is apparent. And it has been specifically held that decisions of the court thus made *de novo* in the proceeding by *certiorari* are not reviewable by the Court of Appeals, as respects the question whether there was any evidence to sustain the determination—after an unanimous affirmance by the Appellate Division. The unanimous affirmance *precludes* the Court of Appeals from *reviewing* or deciding such a question.

People ex rel. Man. Ry. Co. v. Barker,
152 N. Y. 417, 429-436.

People ex rel. Sands v. Feitner, 173 N.
Y. 647, 649.

In the present case the Special Term tried the issue of fact presented to it. It was required by the statute to proceed and dispose of the matter in a summary way (Code Civ. Pro., § 2039) and to find generally by its decision whether or not the facts existed which constituted the prisoner a fugitive from justice, and justified a sur-

render.—Specific findings were not required.—It decided the issue of fact presented to it, necessarily holding that the facts existed which constituted the prisoner a fugitive from justice—that the facts existed which warranted the legal conclusion that he was a fugitive from justice. Its order was *unanimously* affirmed by the Appellate Division (Order of App. Div., Record, 103). The review of the question, by virtue of the specific mandate of the State Constitution, there ended. The Court of Appeals could not, and, hence, presumably, did not, review it, or decide it.

It is no answer to this to say that the question as to what constitutes a person a fugitive from justice within the meaning of the law of inter-state rendition presents, in one aspect, a question of law. The question whether a defendant in a criminal case, for example, was guilty of larceny, presents, in one aspect, a question of law. The verdict that he is guilty of larceny imports that the facts exist which constitute his guilt of that crime as defined by the statute. So, also, the decision that the prisoner was a fugitive from justice imports that the facts exist which constitute him a fugitive within the meaning of the law of inter-state rendition.

It makes no difference that in the general finding fact and law were commingled. The general finding is treated the same as a general verdict—which commingles fact and law (*People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 435; *Cons. El. Storage Co. v. Atlantic Trust Co.*, 161 N. Y. 605, 610-611; cf. *Fayerweather v. Ritch*, 195 U. S. 276, 302).

The point is that the Court of Appeals was prohibited from deciding whether the facts ex-

isted which warranted the conclusion that he was a fugitive. Hence, it did not review or decide that question.

Now it may be asked what all this has to do with the jurisdiction of THIS COURT of the present writ of error. The answer is that it lies at the basis of the question whether or not this court has JURISDICTION.

We have pointed out that, under Jud. Code, § 237, in order to give this court jurisdiction to review the final judgment of the COURT OF APPEALS, it must appear that not only was there a Federal right, privilege or immunity set up and claimed, but that there was also a DECISION *against* it by that court.

Our contention is, then, that, even assuming that a right, privilege or immunity not to be extradited was set up and claimed, and that the setting up thereof presented a Federal question,* there was no *decision* of the New York COURT OF APPEALS in respect thereto, no decision against it—because, by the provision of the Constitution of New York, the Court of Appeals was precluded from reviewing or deciding that question.

The question whether or not the prisoner was a fugitive from justice (within the meaning of the Federal constitution and laws) depended upon whether or not he was within the demanding State at the time of the commission of the alleged crime, or, at the time the crime was al-

* The argument is equally applicable if it be assumed that there was drawn in question the validity of an authority exercised under the State on the ground of its repugnance to the Constitution or laws of the United States—because in such a case, also, it must appear, to give this court jurisdiction on writ of error that there was a *decision* by the Court of Appeals in favor of its validity.

leged to have been committed. That question was presented to and determined by the Special Term. It was a question of fact.

The Special Term decided the issue against the prisoner. It necessarily held that he was within the demanding State at the time of the commission of the alleged crime and was, hence, in fact, a fugitive from justice—that the facts existed which constituted him a fugitive from justice. The Appellate Division *unanimously* affirmed that determination. An appeal lay to the Court of Appeals from the final order. The Court of Appeals was the highest court of the State in which a decision "*in the suit*" could be had [*vid.* Jud. Code, § 237]; but the Court of Appeals had no jurisdiction to review or decide the question whether or not the facts existed which constituted the prisoner a fugitive from justice. Seek to disguise it in any form, the question comes back to that proposition. That was the FEDERAL QUESTION in the case; OTHERWISE THERE IS NONE. And the Court of Appeals was precluded from deciding *that* question by the fundamental law of New York.

This court will recognize the limitations imposed upon the jurisdiction of the New York Court of Appeals, and if that court, giving effect to the local law, did not pass upon the asserted Federal right, and *hence* did not *deny* it, its judgment will not be reviewed here.

Missouri Pac. Ry. Co. v. Taber, 244 U. S. 200, 202.

If there is a local—non-Federal—ground broad enough to sustain the judgment, and not put forth as a mere subterfuge, this court, notwithstanding that there was a Federal question pre-

sented, will decline jurisdiction. Where the judgment of the State court does not necessarily depend on the decision of a Federal question, this court will not review it.

Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157, 164.

If the judgment of the State court was put upon two grounds, one of which was a non-Federal ground, which had fair support and was *bona fide*, and the other of which was a Federal ground, this court will decline jurisdiction where the non-Federal ground is broad enough to sustain the judgment. *A fortiori* where the Court of Appeals, by virtue of the limitations on its jurisdiction, has, or must be assumed to have, declined to pass upon the alleged Federal question, this court will decline jurisdiction.

“This case comes here from a state court, and, of course, therefore it must appear that a Federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power.”

Western Union Telegraph Co. v. Wilson, 213 U. S. 52, 53.

To the same effect:

De Saussure v. Gaillard, 127 U. S. 216.

Johnson v. Risk, 137 U. S. 300.

Leathe v. Thomas, 207 U. S. 93, 99.

It makes no difference that the Court of Appeals wrote no opinion setting forth the grounds upon which it rested its judgment.

Johnson v. Risk, 137 U. S. 300.

Bachtel v. Wilson, 204 U. S. 36.

Adams v. Russell, 229 U. S. 353, 360.
Cuyahoga Power Co. v. North'n Realty Co., 244 U. S. 300, 304.

Before this court can pronounce a judgment of a State court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was."

Bachtel v. Wilson, 204 U. S. 36, 40.
Adams v. Russell, 229 U. S. 353, 360.

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented for decision but that its decision was necessary to the determination of the cause, and that it was *actually decided*, or that the judgment as rendered could not have been rendered without deciding it."

Adams v. Russell, 229 U. S. 353, 360-361.

In this case, we are further reinforced by the proposition that, regard being had to the settled local law concerning the jurisdiction of the Court of Appeals, that court must be deemed not to have passed upon the alleged Federal question at all.—That it affirmed the order, instead of dismissing the appeal, is of no consequence. The appeal was properly before it—inasmuch as an appeal lay from the final order; and, hence, the proper, and customary practice, was for the court to decree affirmance instead of to dismiss. It affirmed because the appeal was properly before it—but, presumably, because the questions sought to be presented to it, in so far as they are now material, were not within its power to review.

III. Wherefore, for the reasons aforesaid, it is respectfully submitted that the writ of error does not lie to the Court of Appeals, that this Court is without jurisdiction, and that the writ of error should be DISMISSED.

Respectfully submitted,

EDWARD SWANN,
District Attorney,
New York County.

ROBERT S. JOHNSTONE,
Assistant District Attorney.

GEORGE F. TURNER,
DON CARLOS BUELL,
Deputy Assistant District Attorneys.

Of Counsel for Defendant-in-error.

March, 1918.

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1917.

<p>JOHN D. IRELAND, <i>Plaintiff-in-error,</i></p> <p><i>against</i></p> <p>ARTHUR WOODS, Police Commis- sioner of the City of New York, <i>Defendant-in-error.</i></p>	}
---	---

SIRS:

PLEASE TAKE NOTICE that the foregoing motion to dismiss (together with the brief and argument in support thereof and annexed thereto) will be submitted to the Supreme Court of the United States for the decision of the Court thereon, at the October, 1917, Term of the Court, to be held in the Capitol in the City of Washington, District of Columbia, when the writ of error is called for argument by the Court.

Dated, New York, February 8th, 1918.

Yours, etc.,

EDWARD SWANN,
District Attorney,
New York County.

ROBERT S. JOHNSTONE,
Assistant District Attorney.
GEORGE F. TURNER,
DON CARLOS BUELL,
Deputy Assistant District Attorneys,
Counsel for defendant-in-error.

To

GEORGE W. WICKERSHAM, Esq.,
40 Wall Street, New York City, N. Y.

HENRY GOLDSTEIN, Esq.,
37 Liberty Street, New York City, N. Y.

ARTHUR C. PATTERSON, Esq.,
27 William Street, New York City, N. Y.

Counsel for plaintiff-in-error.

Accepted by
Mr. Robert S. Johnson

FILED

MAR 5 1918

Supreme Court of the United States

OCTOBER TERM, 1917

No. 911.

JOHN D. IRELAND,

Plaintiff in error,

against

**ARTHUR WOODS, Police Commissioner of the City of
New York,**

Defendant in error.

**IN ERROR TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

BRIEF FOR DEFENDANT-IN-ERROR

EDWARD SWANN,
District Attorney of the
County of New York

ROBERT S. JOHNSON,
Assistant District Attorney,

ROBERT D. PRETTY,

DON CARLOS BUELL,

Deputy Assistant District Attorneys,

Counsel for defendant in error.

March, 1918

INDEX.

	PAGE
STATEMENT	1
THE PROCEEDINGS BELOW	2
The petition for the writ of <i>habeas corpus</i>	2
The return to the writ.....	3
The local practice	3
The traverse to the return.....	3
The specific issues involved.....	4
GENERAL THEORY UPON WHICH THE EXTRA- DITION WAS ORDERED	7
THE EVIDENCE CONSIDERED	7
The specific issue actually tendered and litigated— whether the prisoner was or was not in fact within the demanding State at the time of the commission of the alleged crimes.....	7
The papers accompanying the requisition.....	9
The indictment—analysis thereof with respect to its allegations of time.....	12
The evidence	15
POINT I: THE PRISONER WAS A “FUGITIVE FROM JUSTICE” WITHIN THE MEANING OF THE UNITED STATES CONSTITUTION AND THE ACT OF CONGRESS, AND, HENCE, THERE WAS IMPOSED UPON THE EXECUTIVE AUTHORITY OF THE STATE OF NEW YORK THE DUTY OF COMPLYING WITH THE DEMAND FOR HIS SURRENDER	28
The Constitutional provision.....	28
The Act of Congress	29
The prerequisites necessary to impose the obligation to comply with a demand for the surrender of an alleged fugitive	29

Not necessary that proof of flight should accompany the requisition	29
A question of fact for the Governor upon whom the demand is made, to be determined by him upon such evidence and in such mode as he may deem satisfactory	31
Governor's warrant establishes a <i>prima facie</i> case—a presumption that all legal prerequisites existed..	32
Burden of overcoming the presumption on the prisoner	33
Prisoner must show either (a) that there was no evidence before the Governor upon which to base a finding that he was a fugitive from justice, or (b) that he is in fact not a fugitive from justice	35
If he adopts the latter mode he must show by evidence that is practically conclusive that he is in fact not a fugitive from justice. This, a rule of substantive law	36
Definition of a fugitive from justice within the meaning of the Constitution and the Act of Congress..	39
Physical presence in demanding State at the time of the commission of the alleged crime, followed by departure suffices.....	39
Motive in going to or leaving State immaterial.....	40
Physical presence at time of consummation of crime not necessary	40
Cases collated	41
The <i>Rinne</i> case	42
The rule in CONSPIRACY cases—physical presence at some time during the period of continuity suffices—unless it was under circumstances that established the impossibility of participation in the crime	44
The <i>Meeker</i> case	44

	PAGE
The <i>Hoffstot</i> case	46
The <i>Armour</i> case distinguished.....	52
Application of the principles underlying those cases to the case at bar.....	56
Prisoner's objections to the indictment untenable...	58
LAYING TIME AND CONTINUITY IN INDICTMENTS FOR CONTINUOUS OFFENCES	59
The cases collated	59
The <i>continuando</i> is laid with certainty.....	61
CONSPIRACY A TRULY CONTINUOUS OFFENCE.....	69
The <i>Kissel</i> and <i>Hyde</i> cases.....	69
Conspiracy a continuous crime and not a series of intermittent crimes.—A partnership in criminal purposes	69
Each party to the conspiracy constantly incurs the guilt thereof, and is consciously offending “through every moment of its existence” until the fulfillment of its purposes or the abandonment of the design, or until, by affirmative action, he withdraws himself from the execution of its pur- poses. And this irrespective of whether or not he commits an overt act.....	73, 79
The indictment at bar charges a continuous conspi- racy	79
It is wholly immaterial whether the prisoner com- mitted an overt act in the demanding State. That is a question which goes to his guilt or innocence.	79
The prisoner's presence in the State of New Jersey during the period of continuity of the conspiracy followed by his departure sufficed to constitute him a fugitive from justice within the meaning of the Constitution and the Act of Congress, and re- quired compliance with the demand for his sur- render	80

POINT II: A STATE HAS THE RIGHT, BY VIRTUE OF ITS RESERVED SOVEREIGN POWER, TO SURRENDER AN ACCUSED PERSON TO ANOTHER STATE OF THE UNION FOR TRIAL THERE, EVEN THOUGH, BY THE FEDERAL CONSTITUTION AND LAWS, NO OBLIGATION SO TO DO IS, IN THE SPECIFIC CASE, IMPOSED UPON IT	84
Difference between international and interstate extradition as respects the powers of the States....	84
The question an open one in this court.....	85
<i>Hyatt v. Corkran</i> , 188 U. S. 691, analyzed—showing that the question of the power of a State to surrender an accused person, in a case where no obligation to do so rested upon it, was not involved or decided.....	85
General principles relating to the effect of Federal legislation on State legislation or State action....	86
The varying effect of Congressional legislation upon State legislation according to the subject and the action of Congress taken with respect thereof	86
Analysis of the Constitutional provision relating to fugitives from justice. Interstate rendition not a delegated power	88
The Act of Congress. The Constitutional function of Congress and the scope and extent thereof—to devise a mode for the performance of the <i>obligation</i> imposed by the Constitution.....	91
The reserved power of the States.....	91
The importance of not confounding powers which are and remain distinct—even though the modes of execution of these powers might be almost identical	92
The history of the Constitutional provision.....	92
It imposed an obligation. It did not limit or prohibit the exercise of a power.....	92

A critical examination of the Constitutional provision and the Act of Congress—showing that their sole function was to impose a duty or obligation in the cases to which they related, and that, even as respects the performance of the obligation, State sovereignty was recognized and brought into prominence	94
The surrender by the State of an accused person in a case where it is not required or obliged to surrender, is not repugnant to or in conflict with the Constitution or the Act of Congress.....	97
The opposing arguments rest upon fallacies or false premises	99
The fallacies and false premises pointed out.....	100
No violation of the provision of the Constitution prohibiting the States from entering into contracts or agreements with one another.....	100
Inter-state rendition essentially a State function	101
The power to surrender fugitives not derived from or dependent upon the Constitution.....	103
The authorities collated.....	103
Bad result that would follow from an assertion of the exclusiveness of the Federal law.....	105
The “full faith and credit” clause of the Constitution	108
A consideration of matters of policy—a brief consideration of some general theories of criminal jurisdiction, showing that evil results would follow from a denial of the power of the State to surrender accused persons to another State.....	110
The <i>Hall</i> case.....	115
The remedy	115
CONCLUSION	117
APPENDIX	119

Table of Cases.

Antelope, The, 10 Wheat 66.....	111
Apollon, The, 9 Wheat 362.....	112
Appleyard v. Mass., 203 U. S. 222.....	2, 10, 30, 31, 32, 33, 39, 40, 50, 79
Armour, <i>In re</i> , N. Y. L. J., May 25, 1910.....	52
Barron v. Baltimore, 7 Pet. 243.....	100
Bassing v. Cady, 208 U. S. 386.....	10, 33, 39, 40
Biddinger v. Police Commr., 245 U. S. 128.....	36, 39, 40, 79, 83, 93, 96
Bond v. Hume, 243 U. S. 15.....	115
Breese v. United States, 203 Fed. Rep. 824.....	74, 75
Brown v. Elliott, 225 U. S. 392.....	72
Burton v. N. Y. C. & H. R. R. Co., Oct. Term, 1917, No. 71, 72	106
Charlestown & Car. R. R. v. Varnville, 237 U. S. 597...	81
Chisholm v. Georgia, 2 Dall. 419.....	94
Clark, Matter of, 9 Wend. 212.....	95
Comm. <i>ex rel.</i> Flower v. Superintendent, 220 Pa. St. 401.	10
Comm. <i>ex rel.</i> Short v. Deacon, 10 S. & R. 125.....	95
Comm. of Mass. v. Klaus, 145 App. Div. [N. Y.] 798..	100
Comm. v. Dunn, 111 Mass. 426.....	61
Comm. v. Harley, 7 Met. [48 Mass.] 506.....	77
Comm. v. Kingman, 14 Gray 85.....	61
Comm. v. Langley, 14 Gray 21.....	61, 62
Comm. v. Macloon, 101 Mass. 1.....	111
Comm. v. Odlin, 23 Pick. 275.....	63
Comm. v. Pray, 13 Pick. 359.....	63
Comm. v. Rogers, 181 Mass. 184.....	73
Comm. v. Sheehan, 143 Mass. 468.....	59
Comm. v. Snow, 14 Gray 20.....	61, 62
Comm. v. Stone, 3 Gray 453.....	64
Comm. v. Tower, 8 Met. [49 Mass.] 527.....	59, 61, 63, 64
Comm. v. Wilson, 1 Phila. 80.....	98
Comm. v. Wood, 4 Gray 11.....	61, 62, 63
Connor v. State, 29 Fla. 455.....	114
Cook, <i>In re</i> , 149 Fed. Rep. 838; aff'd. as Cook v. Hart, 146 U. S. 183.....	40, 41
Cruthers v. State, 161 Ind. 139.....	114

Davis's Case, 122 Mass. 324.....	80, 81
Dennison v. Christian, 72 Neb. 703.....	98, 104
Drew v. Thaw, 235 U. S. 432.....	11, 40, 53, 81
Duddy's Case, 219 Mass. 548.....	10
Edmunds v. Griffin, 177 Iowa 389.....	11
Employers Liability Cases, 207 U. S. 463.....	88
Erie R. R. Co. v. New York, 233 U. S. 671.....	87
<i>Ex parte</i> Edwards, 44 So. 827.....	11
<i>Ex parte</i> Foss, 102 Cal. 347.....	95, 96
<i>Ex parte</i> Pearce, 32 Tex. App. 301; aff'd. as Pearce v. Texas, 155 U. S. 311.....	81
<i>Ex parte</i> Reggel, 114 U. S. 642.....	10, 30, 31, 32, 33, 35
<i>Ex parte</i> Swearingen, 13 S. C. 74.....	81
Farrell v. Hawley, 78 Conn. 150.....	31, 32, 39
Fetter, Matter of, 23 N. J. L. 315.....	93, 95, 98, 106
Fisher v. Steele, 39 La. Ann 447.....	100
Fong Yue Ting v. United States, 149 U. S. 698.....	95
Fornage's Case, Moore Int. Dig., Vol. 2, §202.....	112
Foss, <i>Ex parte</i> , 102 Cal. 347.....	95, 96
Gibbons v. Ogden, 9 Wheat 1.....	87, 91
Graham v. People, 181 Ill. 477.....	114
Green v. Davies, 182 N. Y. 499.....	72
Greenough, <i>In re</i> , 31 Vt. 279.....	81
Haddock v. Haddock, 201 U. S. 562.....	109
Hayes v. Palmer, 21 App. Cas. Dis. Col. 450.....	55
Hedderly v. United States, 193 Fed. Rep. 561.....	74
Hoffstot v. Flood, 218 U. S. 665.....	54
Holmes v. Jennison, 14 Pet. 540.....	85, 98, 112
House v. Mayes, 219 U. S. 270.....	88
Houston v. United States, 217 Fed. Rep. 852.....	72
Huntington v. Attrill, 146 U. S. 657.....	111
Hyatt v. Corkran, 188 U. S. 691.....	30, 31, 33, 36, 37, 38, 39, 40, 48, 55, 85, 97
Hyde v. Shine, 199 U. S. 62.....	72
Hyde v. United States, 225 U. S. 347.....	69, 72, 73, 74, 75, 78, 79
Illinois Cent. R. R. Co. v. Pub. Util. Com., Nos. 416, 448, Oct. Term, 1917.....	102



Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 4

	PAGE
<i>Innes v. Tobin</i> , 240 U. S. 127.....	29, 88, 90, 107
<i>In re Armour</i> , N. Y. L. J., May 25, 1910.....	52
<i>In re Cook</i> , 49 Fed. Rep. 838; aff'd as <i>Cook v. Hart</i> , 146 U. S. 183.....	40, 41
<i>In re Greenough</i> , 31 Vt. 279.....	81
<i>In re Kaine</i> , 14 Fed. Cas. 84.....	95
<i>In re Keller</i> , 36 Fed. Rep. 681.....	33, 40
<i>In re Kopel</i> , 148 Fed. Rep. 505.....	97
<i>In re Neely</i> , 103 Fed. Rep. 626; aff'd 180 U. S. 126.....	95
<i>In re Roberts</i> , 24 Fed. Rep. 132; aff'd as <i>Roberts v. Reilly</i> , 116 U. S. 80.....	81
<i>In re Strauss</i> , 197 U. S. 324.....	31, 40, 41
<i>In re Sultan</i> , 115 N. C. 57.....	40, 41
<i>In re Voorhees</i> , 32 N. J. L. 141.....	39, 81
<i>In re White</i> , 55 Fed. Rep. 54.....	40
 <i>Jacobs v. Comm.</i> , 5 Serg. & R. 315.....	 61
<i>Jones v. United States</i> , 162 Fed. Rep. 417.....	74
 <i>Kaine, In re</i> , 14 Fed. Cas. 84.....	 95
<i>Keller, In re</i> , 36 Fed. Rep. 681.....	33, 40
<i>Keller v. United States</i> , 213 U. S. 138.....	88, 92, 117
<i>Kentucky Nat. Bank v. Kellog</i> , 183 N. Y. 92.....	20
<i>Kentucky v. Dennison</i> , 24 How. 66.....	11, 29, 53, 90, 91, 93, 95, 96, 97, 101, 104, 106, 109
 <i>Ker v. Illinois</i> , 119 U. S. 436.....	 95, 106
<i>Kingsbury's Case</i> , 106 Mass. 223.....	2, 40, 79
<i>Kissel v. United States</i> , 218 U. S. 601.....	74
<i>Knowlton's Case</i> , 5 Crim. Law Mag. 250.....	98
<i>Kopel, In re</i> , 148 Fed. Rep. 505.....	97
<i>Kopel, People ex rel. v. Bingham</i> , 189 N. Y. 124, 127....	97
 <i>Lake Shore & Mich. South. Ry. v. Ohio</i> , 173 U. S. 285....	 87
<i>Lascelles v. Georgia</i> , 148 U. S. 537.....	29, 90, 93, 95, 96, 97, 107
<i>Leary's Case</i> , 6 Abb. N. C. 43.....	81
<i>Livingston v. Moore</i> , 7 Pet. 469, 546.....	112
<i>Louisiana v. Texas</i> , 176 U. S. 1.....	100
 <i>McCray v. United States</i> , 195 U. S. 27.....	 87
<i>McDonald v. Mabree</i> , 243 U. S. 90.....	112
<i>McHenry County v. Brady</i> , 163 N. W. 540.....	100

McKelvey v. United States, 241 Fed. Rep. 801.....	72
McNichols v. Pease, 207 U. S. 100.....	18, 28, 31, 32, 33, 36, 37, 50, 54, 57
Mahon v. Justice, 127 U. S. 700.....	94, 106
Marbles v. Creeey, 215 U. S. 63.....	31, 32
Mason v. United States, 244 U. S. 362.....	19
Matter of Clark, 9 Wend. 212.....	95
Matter of Fetter, 23 N. J. L. 311.....	93, 95, 98, 106
Matter of Henry, 13 Misc. 734.....	34, 35
Matter of Hoffstot, N. Y. L. J., May 24, 1910 [Opin. of Hughes, G.] ; 180 Fed. Rep. 240 ; 218 U. S. 665....	41, 44, 45, 46, 54, 78
Matter of Mitchell, 4 N. Y. Crim. Rep. 596.....	31
Matter of Strauss, 197 U. S. 324.....	83
Meyer v. United States, 220 Fed. Rep. 800.....	72, 76
Minnesota Rate Cases, 230 U. S. 352.....	87
Munsey v. Clough, 196 U. S. 364.....	31, 32, 33, 36, 37, 40
Neely, <i>In re</i> , 103 Fed. Rep. 626 ; aff'd 180 U. S. 126....	95
N. Y. C. R. R. Co. v. Winfield, 244 U. S. 147, 148.....	87
New York v. Miln, 11 Pet. 102.....	87, 88, 92, 94
Ochs v. People, 124 Ill. 399.....	75
Our House No. 2 v. State, 4 Greene [Iowa] 172.....	59
Patterson v. United States, 222 Fed. Rep. 599.....	70, 77, 79
Paul v. Virginia, 8 Wall. 168.....	109
Pearce, <i>Ex parte</i> , 32 Tex. App. 301 ; aff'd as Pearce v. Texas, 155 U. S. 311.....	81
People v. Adams, 17 Wend. 475.....	64, 65
Arnstein, 211 N. Y. 585.....	110, 111
Botkin, 132 Cal. 231.....	111
Griswold, 213 N. Y. 92.....	109
Mather, 4 Wend. 229.....	73, 75
Merrill, 2 Park. Crim. Rep. [N. Y.] 590.....	112
Storrs, 207 N. Y. 147.....	73
Willis, 23 Misc. 568.....	75
Zayas, 217 N. Y. 78.....	111
People <i>ex rel.</i> Corkran v. Hyatt, 172 N. Y. 176.....	40
Danziger v. House of Mercy, 128 N. Y. 180	3, 4, 34, 35

	PAGE
People <i>ex rel.</i> Evans v. McEwen, 67 How. Pr. [N. Y.]	
105	3, 35
Forbes v. Markell, 92 Hun 286.....	34
Gamaldi v. Warden, 160 App. Div. 480....	3
Genna v. McLaughlin, 145 App. Div.	
513	10, 30, 36
Hamilton v. Police Commr., 100 App. Div.	
483	33, 81
Himmelstein v. Baker, 137 App. Div. 824..	80, 81
Jourdan v. Donohue, 84 N. Y. 428.....	40, 83
Kopel v. Bingham, 189 N. Y. 124.....	97
Lawrence v. Brady, 56 N. Y. 182.....	80
Marshall v. Moore, 167 App. Div. 479; aff'd	
217 N. Y. 632.....	30, 31, 33
Meeker v. Baker, 142 App. Div. 598..	30, 31, 41, 44
Sinkler v. Terry, 108 N. Y. 1.....	35
Tweed v. Liscomb, 60 N. Y. 559.....	34
Pettibone v. Nichols, 203 U. S. 192.....	10, 31, 106
Pierce v. Creecy, 210 U. S. 387.....	81, 82
Presser v. Illinois, 116 U. S. 252.....	88, 94
Prigg v. Pennsylvania, 16 Pet. 539.....	90, 106
 Reed v. United States, 224 Fed. Rep. 378.....	 10, 33, 39, 81
Reggel, <i>Ex parte</i> , 114 U. S. 642.....	10, 30, 31, 32, 33
Reid v. Colorado, 187 U. S. 137.....	87
Richardson v. Northrup, 66 Barb. 85.....	59, 61
Robb v. Connolly, 111 U. S. 624.....	97, 101
Roberts v. Reilly, 116 U. S. 80.....	30, 31, 32, 33, 40
Roberts, <i>In re</i> , 24 Fed. Rep. 132; aff'd as Roberts v. Reilly,	
116 U. S. 80.....	81
Ryan v. United States, 216 Fed. Rep. 13.....	72
 South Carolina v. United States, 199 U. S. 437.....	 87
State v. Anderson, 1 Hill L. R. [S. C.] 327.....	98
Brown, 14 N. D. 529.....	59, 60, 61
Buzine, 4 Harr. [Del.] 572.....	93
Clough, 71 N. H. 594; aff'd as Munsey v. Clough,	
196 U. S. 364.....	81
Cofren, 48 Me. 364.....	59
Haddock, 9 N. C. 461.....	64
Hall, 115 N. C. 811.....	98, 110, 111, 115

	PAGE
State <i>v.</i> Lesh, 27 N. D. 165.....	50, 61
O'Connor, 38 Minn. 243.....	81
Paine, 1 Ind. 163.....	61
State <i>ex rel.</i> Rinne <i>v.</i> Gerber, 111 Minn. 132.....	41, 42
Munsey <i>v.</i> Clough, 71 N. H. 594; <i>aff'd as</i> Munsey <i>v.</i> Clough, 196 U. S. 364.....	82
Stearns <i>v.</i> Minnesota, 179 U. S. 223.....	100, 101
Stewart <i>v.</i> Jessup, 51 Ind. 413.....	114
Strassheim <i>v.</i> Daily, 221 U. S. 280.....	20, 41, 43, 50, 79
Strauss, <i>In re</i> , 197 U. S. 324.....	40, 41
Sultan, <i>In re</i> , 115 N. C. 57.....	40, 41
Swearingen, <i>Ex parte</i> , 13 S. C. 74.....	81
 Texas <i>v.</i> White, 7 Wall. 700.....	 117
The Antelope, 10 Wheat 66.....	111
The Apollon, 9 Wheat 362.....	112
 U. B. R. Co. <i>v.</i> E. T. etc. R. Co., 14 Ga. 327.....	 100
United States <i>v.</i> Barber, 157 Fed. Rep. 889.....	75
Brace, 149 Fed. Rep. 874.....	74
Bradford, 148 Fed. Rep. 413.....	74
Greene, 115 Fed. Rep. 343.....	75
Kissel, 218 U. S. 601.....	69, 73, 78
Rabinowitch, 238 U. S. 78.....	72
Raley, 173 Fed. Rep. 159.....	74
Rauscher, 119 U. S. 407.....	85, 94
Stern, 186 Fed. Rep. 854-855.....	75
 Voorhees, <i>In re</i> , 32 N. J. L. 141.....	 39
Virginia <i>v.</i> Tennessee, 148 U. S. 503.....	100
 Ware <i>v.</i> Hylton, 3 Dall. 199.....	 88
Ware <i>v.</i> United States, 154 Fed. Rep. 577.....	74
Warren <i>v.</i> United States, 199 Fed. Rep. 753.....	74
Wells <i>v.</i> Comm., 12 Gray 326.....	59, 64
Wharton <i>v.</i> Wise, 153 U. S. 155.....	100
White, <i>In re</i> , 55 Fed. Rep. 54.....	40
Wilson <i>v.</i> United States, 190 Fed. Rep. 427.....	75

Textbooks.

	PAGE
Am. Law Review, XVIII, 690.....	109
Burham., Vol. II, 179, §§23, 27.....	105
Chase's Stephen's Digest, Art. 80, pp. 203-204.....	108
Chitty Cr. Law, Vol. I.....	66
Chitty Pl., Vol. I.....	66
Cye., Vol. VIII, p. 217.....	20
Farrand, Records of Fed. Convention, Vol. III, 112.....	92, 93
Greenbag, Vol. XIX, 636-644.....	98
Harvard Law Review, Vol. XXI, 224-225.....	98, 107
Hawkins, Bk. 2, Ch. 25, §2.....	64, 65
Moore, Int. Dig., Vol. I, §202.....	111
Moore, Int. Dig., Vol. IV, §579.....	85
Moore on Extradition, Vol. I, §58.....	85
Moore on Extradition, Vol. II, §§516, 517.....	92
Moore on Extradition, Vol. II, §536.....	85
Moore on Extradition, Vol. II, §542.....	106
Moore on Extradition, Vol. II, §607.....	92
N. Y. Law Journal, May 24, 1910.....	46
N. Y. Law Journal, May 25, 1910.....	52, 54
Note 21 L. R. A. [N. S.], 939.....	40
Pomeroy's Archbold's Cr. Pr. & Pl., Vol. I.....	55
Story's Conflict of Laws, §627.....	105
Vattel, b. 2, c. 6, §76.....	105
Wharton, Crim. Law [11th Ed.], §310.....	111

Constitutions and Statutes.

Act of Feb. 12, 1793—U. S. Rev. Stat., §5278.....	99
New York Code Civ. Pro., §2031.....	3
New York Code Civ. Pro., §2039.....	29, 35
New York Code Crim. Pro., §827.....	116, 119
U. S. Const., Art. I, §8.....	101
U. S. Const., Art. I, §10.....	89

	PAGE
U. S. Const., Amdt. X.....	88, 89, 94
U. S. Const., Art. IV, §1.....	89, 108
U. S. Const., Art. IV, §2.....	11, 28, 110
U. S. Const., Art. IV, §2, subd. 2.....	2
U. S. Rev. Stat., §905.....	108
U. S. Rev. Stat., §5278.....	2, 11, 29, 101
U. S. Rev. Stat., §5278.....	90

o
o
s
A
Y
o
a
o
w
a
w
G
r
f
a

Supreme Court of the United States

OCTOBER TERM, 1917.

JOHN D. IRELAND,
Plaintiff-in-error,

against

ARTHUR WOODS, Police Commis-
sioner of the City of New
York,

Defendant-in-error.

No. 611.

BRIEF FOR DEFENDANT-IN- ERROR.

Statement.

This case comes before this Court on a WRIT OF ERROR to the Court of Appeals of the State of New York to review a final judgment of the said Court of Appeals affirming an order of the Appellate Division of the Supreme Court of New York which affirmed an order of a Special Term of the Supreme Court of New York dismissing a writ of *habeas corpus* and remanding the prisoner to the custody of the Police Commissioner, with directions to deliver him to the authorized agent of the State of New Jersey—in accordance with the command of a rendition warrant of the Governor of New York for his arrest and surrender to the State of New Jersey as a fugitive from justice, which warrant had been returned as the cause of detention.

THE PROCEEDINGS BELOW.

In setting forth the proceedings it is better to take them in their logical, rather than in their strictly chronological order.

1. The Governor of New York issued a rendition warrant. The prisoner was taken into custody thereunder. He sued out a writ of *habeas corpus*. In the PETITION for the writ he alleged that his arrest and imprisonment were illegal and in violation of U. S. Const. Art. IV, § 2, subd. 2 and U. S. Rev. Stat., § 5278 for the reasons, as claimed by him:

1. That the Executive warrant showed that the crimes with which he was charged were committed in the State of New Jersey; and that the papers accompanying the requisition of the Governor of New Jersey were not authenticated as required by the Act of Congress.*

2. That it appeared on the face of the indictment accompanying the requisition that no crime under the laws of New Jersey was charged or had been committed.

3. That it did not appear that there was any evidence before the Governor of the State of New Jersey, at the time he issued his demand, that the petitioner was within the limits of the State of New Jersey at the time the crimes were alleged to have been committed.

4. That the Governor of the State of New York had no jurisdiction to issue his warrant, in that it did not appear before *him* that the petitioner was a "fugitive" from the State of New Jersey or had "fled" therefrom.

5. That it nowhere appeared that the petitioner was personally within the limits of the

* U. S. Rev. Stat. § 5278. The certificate of the demanding governor that the papers are authentic suffices (*Kingsbury's Case*, 106 Mass. 223; *Appleyard v. Mass.*, 203 U. S. 222, 228).

State of New Jersey at the time the alleged crimes were stated to have been committed.

6. That the petitioner was not within the limits of the State of New Jersey at any of the times when the crimes charged in the indictment or any of them were committed.

2. The writ was served on the Police Commissioner. He produced the prisoner in obedience to the command thereof, and made RETURN thereto, assigning the Governor's warrant as the cause of detention.

—Under the local law the petition for a writ of *habeas corpus* is regarded merely as an *ex parte* application to the court to procure the issuance of the writ. It becomes *functus officio* after the writ is issued. The prisoner, if he desires to challenge the validity of the cause of detention assigned in the return to the writ, must interpose an answer or traverse to the return; and the inquiry is limited to the issues raised thereby (*People ex rel. Danziger v. House of Mercy*, 128 N. Y. 180, 187, 189; *People ex rel. Gamaldi v. Warden*, 160 App. Div. 480, 481; *People ex rel. Evans v. McEwen*, 67 How. Pr. [N. Y.] 105, 111; N. Y. Code Civ. Pro., §§ 2031, 2039). If there is no traverse the return is to be taken as true.—Of course, if the return is insufficient in law on the face thereof a traverse is unnecessary.

3. The prisoner accordingly traversed the return. In his TRAVERSE, he:

1. Denied that he committed the crime of conspiracy, fraud, or obtaining money under false pretenses, or any other crime in the State of New Jersey or elsewhere.*

* This, of course, was immaterial; and it may be eliminated from further consideration. The guilt or innocence of the prisoner can never be inquired into in extradition proceedings.

2. Denied that he was within the State of New Jersey at the times mentioned in the indictment upon which the requisition of the Governor of the State of New Jersey was issued, and upon which the warrant of the Governor of the State of New York was issued—alleging, in this connection, that the said indictment charged him with the crime of conspiracy, fraud and obtaining money under false pretenses “on the 1st day of January, 1913, the 9th day of June, 1913, and the 12th day of July, 1913.”

3. Alleged affirmatively that he was not within the State of New Jersey at any such times, and that he was not within the said State when said alleged crimes were committed, nor at the time of the finding of the said indictment.

4. Alleged that he was not a “fugitive” from the State of New Jersey and had not “fled” from that State.

5. Stated that he had examined “a sworn copy of the *requisition* of the Governor of *New Jersey* to the Governor of New York, and that *said papers* do not contain any evidence or proof that said John D. Ireland was in the State of New Jersey on any day in any of the months set forth in said indictment.”

The only issues in the case were those raised by the TRAVERSE to the RETURN (*People ex rel. Danziger v. House of Mercy*, 128 N. Y. 180, 187, 189); and to these the evidence was directed.

It will be noticed that the TRAVERSE contains no allegation of a lack of evidence before the Governor of New York to show that the prisoner was a “fugitive from justice”—*i. e.*, to show that he was within the demanding state at the time of the commission of the alleged crime. Its allegations are merely to the effect:

1. That there was no proof of the fact that the accused was a fugitive from justice contained in the *papers accompanying the requisition*

tion of the Governor of New Jersey [No. 5 *supra*];

2. That the prisoner was not within the State of New Jersey on the *specific* dates mentioned in the indictment [No. 2 *supra*]; and

3. That he was not within the State of New Jersey when the alleged crimes were committed, and was not a "fugitive from justice" of that state [Nos. 3 and 4 *supra*].

The Court took evidence upon the issues raised, and after a full hearing dismissed the writ and ordered the delivery of the prisoner. The evidence will be considered hereafter.

The prisoner appealed from the order to the Appellate Division. The Appellate Division UNANIMOUSLY affirmed the order (Order of App. Div., Record, 103). The prisoner then appealed to the Court of Appeals from the order of the Appellate Division. The Court of Appeals gave judgment affirming the order (Record, 2).—We wish to emphasize the fact that the decision of the Appellate Division was *unanimous*, as that fact forms the basis of a proposition which concerns the jurisdiction of this Court of the present writ of error to the COURT OF APPEALS—a proposition which we have discussed in the Motion to Dismiss.

General theory upon which the extradition was ordered.

The rendition warrant in this case was *not* granted upon the theory or supposition that a "constructive presence" of the prisoner in the demanding state would suffice to render him a fugitive from justice within the meaning of the

Constitution and the Act of Congress, and hence, require compliance with a demand for his surrender.

1. The case proceeded primarily upon the theory that the crime charged—CONSPIRACY—was a “continuing” one, that it was—and was alleged to be—*continuously in course of commission over an extended period of time* [see Indictment, 6th Count, Record, 96], and that during *that time* the prisoner was physically present in the demanding state on three separate occasions—and under circumstances that did not establish the impossibility of his participation in the crime.

The *fact* of the prisoner’s physical presence in the State of New Jersey on these three occasions (which was shown by the testimony introduced by himself in the *habeas corpus* proceeding) would, we contend, suffice to render him a fugitive from justice within the meaning of the Constitution and the Act of Congress—particularly as his presence there on those occasions (one of them especially) was under circumstances that did not negative the possibility of his participation in the crime. So that the evidence introduced by the prisoner in the *habeas corpus* proceeding, so far from overcoming the presumption in favor of his removal created by the Governor’s warrant, strengthened and confirmed that presumption and rendered it practically conclusive.

2. Moreover (as was, we contend, circumstantially indicated) the prisoner committed acts in that state which had a direct relationship to the crime charged, and were part of the *res gestae* of

the conspiracy; and the commission of these acts indicated *circumstantially* his *presence* in the State of New Jersey at the time of the commission of the crime—even with reference to the specific dates laid in the indictment.

We shall make our main contention, however, now, as heretofore, upon the proposition that the prisoner's presence in the State of New Jersey during the period of continuity of the conspiracy (under circumstances that did not establish the impossibility of his participation therein) is, in itself, sufficient to make him a "fugitive from justice" within the meaning of the Constitution and the Act of Congress—and to impose upon the executive authority of New York the *duty* to surrender him.

THE EVIDENCE CONSIDERED.

At the opening of the hearing in the *habeas corpus* proceeding, the return of the Police Commissioner was presented (Record, 8-9).—The Governor's warrant made out a *prima facie* case.—The prisoner's counsel thereupon said:

"If your Honor please, I have prepared here a traverse, which I have not had a chance to have verified, which shows that the relator was not within the State of New Jersey at the time any of the alleged crimes were committed."

Thereupon, the Court inquired, "Is that the point to be raised in these proceedings?" to which counsel replied, "Yes, sir" (Record, 9), further saying:

"Of course, it is not necessary for me to say that I will submit authorities to show that the Court has ample authority to review the matter *de novo*" (Record, 9).

Counsel for the prisoner then put in evidence a copy "*of the requisition of the Governor of the State of New Jersey*" and "*the papers annexed thereto*" (Record, 9). It then appeared, during the course of a colloquy between the Court and counsel, that there was an oral hearing before the Governor of New York before he issued his rendition warrant, and that certain testimony was taken or concessions were made on that hearing concerning the presence of the prisoner in the State of New Jersey (Record, 9-10). No record of these proceedings before the Governor of New York was produced by the prisoner or put in evidence. *No attempt was made by him to prove, by common law evidence, or otherwise, what was adduced before the Governor of New York on that hearing.**

No question was raised by the prisoner concerning the sufficiency of the evidence before the Governor of New York to give him jurisdiction to issue his rendition warrant. The prisoner sought to show that he was not in fact a fugitive from justice; and to that end he put in evidence a copy of the requisition of the Governor of New Jersey and the "papers annexed thereto," among which was an authenticated copy of the *indictment*—which showed the "time" when the crimes were alleged to have been committed. Then he gave evidence concerning his presence in and absence from the State of New Jersey with reference thereto.—Incidentally, he claimed that the warrant was invalid because no proof

* It will be noticed also that the affidavit of the stenographer who made the copy of the requisition papers put in evidence states only that it is a copy of the "**original requisition papers**" on file in the Executive Chamber and of the whole thereof (Record, 100).

of "flight" was contained in the papers annexed to the requisition of the demanding Governor.

Concerning the papers accompanying the requisition:

Before considering the indictment and the testimony taken upon the hearing of the writ, we shall discuss the papers (other than the indictment) which *accompanied the requisition*.

The statements contained in the application of the Prosecutor of the Pleas of Atlantic County, N. J., to the Governor of New Jersey for the issuance of a requisition upon the Governor of New York, and in the affidavit of Charles H. Apple, which was apparently attached to that application, upon which much emphasis was laid below, might tend to suggest that the Prosecutor did not consider that proof of the physical presence of the accused in the State of New Jersey was essential to render him extraditable. But that does not matter—even if it be assumed to be the fact. The question with which we are here concerned is *not* what the views of the Prosecutor may have been respecting the law of interstate rendition. It is whether the action of the Governor of New York, in issuing his rendition warrant for the surrender of the accused, was shown to have been in conflict with the Federal Constitution and Laws; or, to state it more accurately, whether the decision of the New York Court of Appeals constituted a denial of a Federal right, privilege or immunity, secured to the prisoner, and by him set up and claimed.

We shall hereafter point out more fully that it was *not* necessary that the requisition of the Governor of New Jersey should be accompanied

by proof that the accused was a fugitive from justice. That was a question of fact for the Governor of *New York* to decide upon such evidence, and in such mode, as *he* might deem satisfactory; and until he satisfied himself on that point he was not bound to comply with the demand [*Ex parte Reggel*, 114 U. S. 642, 651-652; *Pettibone v. Nichols*, 203 U. S. 192, 204]. The presumption was that he acted upon sufficient evidence until the contrary was shown.—*It was not shown in this case.*

The PUBLIC PROSECUTOR states in his application, which accompanied the requisition, that the defendant is "a fugitive from justice" (Record, 88). That is a statement of a *fact*, and may be so regarded (*Duddy's Case*, 219 Mass. 548, 550-551; *Ex parte Reggel*, 114 U. S. 642, 653).

APPLE states in his affidavit merely that the prisoner * * * was not personally present in the place where the crime is alleged to have been committed in the said *County of Atlantic* * * * (Record, 100). He does *not* state that the prisoner was not present *in the State of New Jersey* at the time of the commission of the crime. And "the question involved in extradition proceedings is not whether the defendant was at the scene of the crime at the time of its commission, but whether he was **anywhere within the demanding state when the crime was committed.**"

People ex rel. Genna v. McLaughlin,
145 App. Div. [N. Y.] 513, 516.

Bassing v. Cady, 208 U. S. 386, 392.

Appleyard v. Mass., 203 U. S. 222, 227.

Reed v. United States, 224 Fed. Rep.
378, 381.

Comm. ex rel. Flower v. Superintendent,
220 Pa. St. 401.

Edmunds v. Griffin, 177 Iowa 389, 391.
Ex parte Edwards, 44 So. [Ga.] 827.

The underlying theory—and it is fundamentally upon this theory that the doctrine of “constructive presence” as an insufficient basis upon which to *insist* upon *compliance* with a *demand* for a surrender rests—is that if the alleged fugitive was within the territorial jurisdiction of the state when the crime was committed, so that, had he remained there he would have been within reach of its criminal process, he does not secure immunity from arrest by passing over an imaginary line into the territory of another state. He shall “on demand of the executive authority of the State from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.” Such is the command of the constitution (U. S. Const., Art. IV, § 2; See *Kentucky v. Dennison*, 24 How. 66, 100, 103, 104; *Drew v. Thaw*, 235 U. S. 432, 439).

There is nothing in these two papers which shows in the slightest degree that the accused was not *in the demanding state* at the time of the commission of the crime. And even if it be assumed that they do not contain sufficient facts to show that he was in fact within the demanding state, that makes no difference whatever.

The prisoner's surrender was demanded as a fugitive from justice (*vid.* Requisition, Record, 87-88). [U. S. Rev. Stat., § 5278.] Before he honored the requisition of the Governor of New Jersey and issued his rendition warrant, the Governor of New York held a hearing. The proceedings upon that hearing were *not* produced before the Courts below and are *not* before this Court. It is important that that fact be kept in

mind—for reasons that we have already indicated and which will hereafter more fully appear.—The presumption is that the Governor of New York satisfied himself concerning the question of fact as to whether the person demanded was a “fugitive from justice,” and that he had sufficient evidence thereof before him. There was no proof offered to overcome that presumption. Indeed, as we have said, there was not even an allegation in the traverse that such proof was lacking.

The Indictment.

The indictment contains six counts. The co-conspirators named in each count are J. D. Ireland (the prisoner) and Charles Stewart, *alias* F. F. Verline, *alias* Charles Stuart, *alias* Robert A. Smith, *alias* Walter Duffy, *alias* William Wood.

The FIRST COUNT charges a conspiracy to defraud the firm of F. P. Cook Sons by means of a worthless letter of credit and a worthless check for \$100, drawn by the prisoner on the Little Falls National Bank to the order of “*Charles Stuart*,” and dated Little Falls, N. J., July 12th, 1913, delivered by the prisoner to the co-conspirator and passed by the latter. The place or venue is laid in Atlantic City, County of Atlantic, N. J. The time laid is **July 12th**, 1913, and “on or about” **July 12th**, 1913 (Record, 89).

The SECOND COUNT charges a like conspiracy to defraud Leeds & Lippincott by means of a worthless letter of credit and a worthless check for \$100, drawn by the prisoner on the Little Falls National Bank to the order of “*F. F. Verline*,” and dated Little Falls, N. J., July 12th,

1913, likewise delivered and passed. The place or venue is laid in Atlantic City, County of Atlantic, N. J. The time laid is **July 12th, 1913** (Record, 91).

The **THIRD COUNT** charges a like conspiracy to defraud The Shelburne Incorporated by means of a worthless letter of credit and a worthless check for \$100, drawn by the prisoner on the Little Falls National Bank to the order of "Robert A. Smith," and dated Little Falls, N. J., July 12th, 1913, likewise delivered and passed. The place or venue is laid in Atlantic City, County of Atlantic, N. J. The time laid is **July 12th, 1913** (Record, 92-93).

The **FOURTH COUNT** charges a like conspiracy to defraud Traymore Hotel Company by means of a worthless letter of credit and a worthless check for \$100, drawn by the prisoner on the Little Falls National Bank to the order of "Walter Duffy," and dated Little Falls, N. J., July 12th, 1913, likewise delivered and passed. The place or venue is laid in Atlantic City, County of Atlantic, N. J. The time laid is **July 12th, 1913** (Record, 93-94).

The **FIFTH COUNT** charges a like conspiracy to defraud Walter J. Buzby by means of a worthless letter of credit and a worthless check for \$100, drawn by the prisoner on the Little Falls National Bank to the order of "*William Wood*," and dated Little Falls, N. J., June 9th, 1913, likewise delivered and passed. The place or venue is laid in Atlantic City, County of Atlantic, N. J. The time laid is **June 9th, 1913** (Record, 95-96).

The **SIXTH COUNT** charges a general blanket CONTINUING CONSPIRACY. It alleges that the co-conspirators

"on or about the first day of January, in the year of our Lord one thousand nine hundred and thirteen, and on divers other days between that day, and the day of the taking of this Inquisition, at the City of Atlantic City, in the County and State aforesaid, and within the jurisdiction of this Court" (Record, 96).

unlawfully and wickedly intending and devising to cheat and defraud certain persons, naming them [the count includes all the persons named in the preceding counts],

"and divers other persons whose names are to this grand inquest unknown" (Record, 96),

conspired to defraud the persons named "and divers other persons whose names are to this grand inquest unknown" (*Id.*, 96), by means of worthless letters of credit and worthless checks drawn on the Little Falls National Bank, Little Falls, N. J., made payable to different persons and signed by J. D. Ireland (*Id.*, 96-97) and delivered by Ireland to the co-conspirator and passed.

The important consideration is that throughout the **6th** count of the indictment there is alleged a general *continuing* conspiracy to defraud divers persons, running from January 1st, 1913, to the time of the taking of the inquisition. Its allegations as to "time," repeated throughout, are:

"on the first day of January, in the year of our Lord, one thousand nine hundred and thirteen, and on divers other days between that day and the day of the taking of this inquisition (Record, 96-98).

And it is alleged throughout that the conspiracy was to defraud not only the persons specifically named, but also

“divers other persons whose names are to this grand inquest unknown” (Record, 96-98).

In short, the offense charged in this count [No. 6] is a general CONTINUING conspiracy to defraud whomever the conspirators could defraud by the putting out and passing of worthless checks and letters of credit drawn by the prisoner. The conspiracy is alleged to have been in course of operation and continuance from the “first day of January, 1913, to the day of the taking of this inquisition.”

The *time* of the taking of the inquisition is indicated with *certainly* by the caption of the indictment, which shows that it was taken

“IN THE ATLANTIC COUNTY COURT OF OVER AND TERMINER, JANUARY TERM, IN THE YEAR OF OUR LORD, ONE THOUSAND NINE HUNDRED AND FOURTEEN” (Record, 89).

NOTE: We have not attempted to enter into any extended analysis of the indictment or to discuss generally its sufficiency as a pleading. We have simply set forth its allegations as to *time* and called attention to the feature of *continuance* as shown by the sixth count, and the general all-embracing nature of the conspiracy and scheme to defraud, as laid therein. For the purposes of this case, it is only necessary to refer to the allegations of “time” and related matters in the indictment—showing the feature of continuity.

The Evidence.

The PRISONER testified that he was not in the State of New Jersey on January 1st, 1913, nor for some time before and after that date; that he was not in the State of New Jersey on June 9th, 1913, and that he was not there on July 12th, 1913, or July 14th, 1913. He gave much testimony concerning his whereabouts at

various times during the year 1913. It is unnecessary to consider that testimony in detail. His claim, in substance, was that he was *not* in the State of New Jersey during the year 1913 except on three occasions—**June 19th, July 30th and in the first week in August.**

He *admitted* that he was in Seabright, New Jersey, on June 19th, 1913; that he went there from New York, arriving a little before dinner, about 7 o'clock, and remained over night (Record, 12-13, 14). He admitted that he again went to Seabright, New Jersey, on July 30th or 31st, 1913, and again remained over night, returning to New York the next day (Record, 15-16). He admitted that, in the early part of August, 1913, he again went to Seabright, New Jersey, and again remained there over night (Record, 16-17).

He claimed that the reason for his going to New Jersey on each of these three occasions was to visit some friends named Carpenter at Seabright. He denied categorically that he was within the State of New Jersey at any other time during the year 1913 than on those three occasions (Record, 20-21), and denied that he had ever been at Atlantic City, N. J., during the year 1913 (Record, 21).

MISS CARPENTER testified that the prisoner spent the evening with her family at Seabright, N. J., on June 19th (Record, 28), and on July 30th (Record, 28) and one day in the first week in August (Record, 29)—but she did *not* see him in the morning of the days following those days, before his return to New York (Record, 28, 29).

Thus, we have his **conceded presence in the state of New Jersey on June 19th, July 30th and one day in the first week in August, 1913** (Record, 20, 26).—And whatever may have been his reasons for going there on these occasions, his

presence there was certainly *not* under circumstances which established the impossibility of his participation in or connection with the conspiracy—the crime charged—which was then going on. Of this more presently.

On *cross-examination*, the prisoner was asked whether at any time during the year 1913, he had a bank account in a bank at Little Falls, N. J. (Record, 21). At the very beginning of his *cross-examination*, he took refuge under his privilege against compulsory self-incrimination, and declined to answer any questions concerning his bank account in the Little Falls Bank (Record, 21 *et seq.*).—In this attitude, he was assisted by the constant interruptions and admonitions of his counsel (Record, 21-25).

He was shown two checks drawn on the Little Falls National Bank, and asked if they were his checks. He refused to answer upon the ground that his answers might tend to incriminate him (Record, 23-25).—These checks will be referred to presently. They were dated at Little Falls, N. J., **June 9th**, 1913, and **July 14th**, 1913, respectively, drawn on the Little Falls National Bank, and were shown to have been signed by the prisoner [Respdt's. Exs. 1, 2, Record, 101; Goldstein, Record, 46, 47]. One check is to the order of "*William Wood*"; the other to the order of "*Chas. Stuart*" (Resp't's. Exs. 1, 2, Record, 101) [Cf. Indictment, Counts 5 and 1 *ante*, pp. 12, 13].*

MR. HENRY GOLDSTEIN, the prisoner's attorney, testified that he had seen the prisoner in

* It is immaterial whether these were the same checks as are referred to in the indictment or not. They were circumstantial evidence of the presence of the relator in New Jersey on the dates they bear. It was as such that they were received in evidence (Record, 46, 47-48, 50).

New York City on a number of days, which he specified, during the year 1913. Among other dates which he specified were June 9th and July 12th and 14th (Record, 38-39).

Respecting June 9th, 1913, his testimony shows that he could not tell at what time of day he had seen the prisoner (Record, 39) nor how long he had seen him (Record, 39). He was certain the prisoner was not with him all day long, and he had no recollection how long he had seen him; it was a casual business interview lasting possibly 5 minutes (Record, 39-40).

Respecting July 14th, Mr. Goldstein's testimony shows that he was not very positive about having seen the prisoner upon that date. His books showed that he had a memorandum to see him—an appointment with him—for that day; but he was not positive that he had actually seen him, but thought that he had (Record, 40-41). He could not specify the hour at which he had seen him, but would "say" it was in the afternoon (Record, 41). He could not tell how long the prisoner was with him and would not swear that it was over half an hour (Record, 41).

His testimony is practically of no value to the prisoner because he admitted that the prisoner was not with him all day, that he merely saw him about business matters for a few minutes, and that a person could go to the State of New Jersey from New York and come back within a very short time—less than 15 minutes (Record, 39, 42-43).^{*} He further testified:

Q. Now Mr. Goldstein, during the year 1913, beginning January 1st, I suppose there were very many days upon which Mr. Ireland may have been in the State of New Jersey without you knowing it? A. Positively, Mr. Johnstone.

^{*} *Vid. McNichols v. Pease*, 207 U. S. 100, 111.

Q. You were not his keeper? A. I was not his guardian or his keeper.

Q. And you were not with him all day long? A. Certainly not.

Q. And New Jersey is contiguous to New York? A. Yes, sir, certainly.

Q. And he could have gone over there and come back in half a day? A. Yes, you can go over there in ten minutes.

Q. Any part of the state? A. Why, certainly (Record, 43).

* * * * *

Q. I will repeat this question so there may be no mistake about it: Mr. Ireland could have been in the State of New Jersey many and many a time during the year without your knowledge—during 1913? A. Why, certainly" (Record, 51).

He testified that he had seen the prisoner write and that he was familiar with his handwriting (Record, 44-45). He was shown two checks; and after much quibbling and evasion and absurd claims of "privilege" (Record, 44-45, *et seq.*, 46), he admitted that the signatures to the checks were in the prisoner's handwriting (Record, 46, 47). These were the same checks which had previously been shown to the prisoner, and concerning which he had declined to answer any questions.—Thus, it was proved that these checks were signed by the prisoner. They have already been described.

The PRISONER was subsequently recalled for further *cross-examination* (Record, 51) and, when questioned concerning these checks, he again asserted his "privilege" (Record, 51 *et seq.*), and when questioned for the purpose of testing his good faith in making the claim of "privilege" * he subconsciously betrayed another reason for refusing to answer:

* *Mason v. United States*, 244 U. S. 362.

"I meant by that, privilege to get me into New Jersey—they want to get me into New Jersey * * * that is what I understood" (Record, 53).

He claimed that he committed no crime (Record, 53), stated that he knew better than anybody else whether he committed a crime or not (Record, 53) and did not think it could incriminate him to answer questions concerning the checks, and did not see how it could, "except the lawyers seemed to think so" (Record, 53-54). He persisted in his refusal to answer any questions as to whether he had a bank account in the Little Falls National Bank, Little Falls, N. J., in 1913 (Record, 55 *et seq.*).

But notwithstanding his attitude it was shown by the testimony of Mr. GOLDSTEIN that the two checks drawn on that bank, dated at Little Falls, N. J., **June 9th** and **July 14th**, 1913, respectively, were signed by the prisoner (Goldstein, Record, 46, 47). These checks were received in evidence as circumstantial evidence tending to show the prisoner's presence in Little Falls, N. J., on those dates (Record, 46, 47-48, 50). They are some evidence tending to prove that fact (*vid.* 8 Cyc., 217; *Chem. Nat. Bank v. Kellogg*, 183 N. Y. 92, 95);—and their value is strengthened by the prisoner's attitude and acknowledged reason for claiming his "privilege," and by the fact that there is no evidence save that of the prisoner himself which has any tendency to negative the fact of his presence at that place on those dates—as we shall hereafter show.*

* As to July 14th it may be said that, while one of the specific dates laid in the indictment is July 12th, it is not necessary to show the prisoner's presence in the demanding state on the exact day laid; his presence *about* that time is enough (*Strassheim v. Daily*, 221 U. S. 280, 285-286). June 9th is a specific date laid.

Respecting the date of **July 30th**, MR. GOLDSTEIN's testimony (Record, 42 *et seq.*) is quite significant. It appeared that he made an entry in his ledger respecting that day as follows:

"Consulting J. D. I. Phoned Atlantic Swinghammer" (Record, 43),

which, he testified, meant that he telephoned to Atlantic City to Mr. Swinghammer in reference to J. D. Ireland [the prisoner]; that, on that day—**July 30th**, 1913—he had a conversation with Mr. Swinghammer in Atlantic City over the telephone in reference to Ireland (Record, 42-43, 51), and that Swinghammer was the attorney in Atlantic City for Mr. Stewart, who was the man named as a co-conspirator in the indictment (Record, 42, 43). He testified that he could not say whether the prisoner Ireland was at his (Goldstein's) office at this time; but he admitted that he did see him (Ireland) on that day and consulted him (Record, 43-44). When this subject was pressed and he was asked whether he had consulted him with reference to Swinghammer, he too hid behind a claim of "privilege" (Record, 64-65).

It was then called to the attention of the witness that the prisoner had testified that he was in Seabright, New Jersey, on July 30th; and he testified:

"I know he testified he was in Seabright in the State of New Jersey on certain dates; what days those are I don't remember" (Record, 65).

The significance of this testimony is clear. We have the following facts. The prisoner was in consultation with Mr. Goldstein on **July 30th**. On the same day, Mr. Goldstein telephoned to

Swinghammer, the attorney of the co-conspirator, who was then in Atlantic City. On **the same evening, the prisoner went over to the State of New Jersey.** He admits that he went there and remained over night at Seabright, N. J. His presence there, under the circumstances, was clearly not such as to negative the possibility of his participation in the conspiracy.—Stewart was first arrested on July 21st, 1913 (Record, 82).*

MR. COGGILL, a lawyer, and a friend of the prisoner, testified that he played golf with the prisoner in the afternoon of June 7th and all day on June 8th, 1913 (Sunday), at Garden City, L. I.; that the prisoner dined with him at the University Club on the evening of June 8th (Record, 65-66); that he saw him on July 5th in York Village, Me. (Record, 66). The prisoner left there on the evening of July 6th (Record, 66). He played golf with the prisoner at Garden City, L. I., in the afternoon of July 12th and all day on July 13th, and they dined together at the club in New York on the evening of July 13th (Record, 65-66). There were numerous occasions during the months of June and July, 1913, when he did *not* see the prisoner, and the prisoner could have been anywhere, so far as he knew (Record, 66).—*His testimony is worthless. It proves nothing.*

The prisoner's sister, MRS. SICARD, testified that she saw him in New York on the *evening* of June 8th, 1913, from 8:30 until 10 or 11, and on the *evening* of June 9th, 1913 (Record, 61-62), from 8 to 11 o'clock (Record, 62). She

* On the argument below the prisoner's counsel referred to the fact that Stewart was first *arrested* on July 21st, as though that brought the conspiracy to an end. Of course, it did nothing of the kind.

did not see him *during the day* (Record, 62). He just came there in the evenings of those two days (Record, 62).—Her testimony also is worthless.

Another sister, MRS. JUNOD, testified that she spent the evening of Dec. 31st—Jan. 1st, 1913, from 11 until 5:30 A. M. with the prisoner at the Belmont, New York City (Record, 62-63); that she saw him at her father's house on the *evening* of June 9th, 1913, and again saw him in New York City on the morning of June 10th, 1913, and from 2 to 7 in the afternoon (Record, 63). She saw him on July 2nd, 1913, about 6 o'clock "coming out of the Ritz with some one" (Record, 63-64). She was not with him and did not know where he was *during the day* of January 1st, 1913, or *during the day* of June 9th, 1913 (Record, 63-64).—Her testimony also is worthless.

MISS CAMPBELL, a companion of the prisoner's mother, testified that she saw him at Mrs. Ireland's house on the *evening* of June 8th and on the *evening* of June 9th. She was sure he was not there *during the day* on either June 8th or 9th. He came about 8:30 in the *evening* of June 9th (Record, 67-68). These were the occasions concerning which Mrs. Junod and Mrs. Sicard had testified [*vid. ante*].—Miss Campbell's testimony also is worthless.

MISS CECILIA LAWSON testified that she saw the prisoner in New York City on June 1st, 1913, that he came to tea and stayed to supper with her on the evening of that day (Record, 34-35), that she saw him again on the evening of June 4th about 8:30, when he saw her off on a train for Maine (Record, 34-35), that she next saw him in Boston on June 14th and at Biddeford Pool,

Maine, on June 15th. He left there on June 15th (Record, 35, 33-34). She next saw him on July 3rd, 4th, 5th and 6th at Biddeford Pool, Me. He left there on July 6th and she did not see him again until July 23rd when she saw him in New York (Record, 34-36). She "had tea with him" in New York City on July 24th and lunch on July 26th (Record, 35-36) and went to the Winter Garden with him on July 29th (Record, 36). Those were the only dates and occasions concerning which she testified; and it is needless to say that her testimony is worthless.

MISS MARGARET LAWSON testified that she saw the prisoner in the afternoon of June 1st—that he came to tea with her in the afternoon; that he came in late and had tea and stayed for supper (Record, 67-68); that she saw him on the night of June 2nd and went to the theatre with him on that night (Record, 67-68); that she saw him on June 4th at the Grand Central Station when he saw her sister off to Maine (Record, 68); that she saw him frequently after that, but could not remember "any date except the 9th" (Record, 68) and the 29th (Record, 68-69). She testified that she saw him in Boston on July 3rd and in Biddeford Pool, Maine, between July 3rd and 5th; that he left there on the morning of the 5th, that she was in Maine and did not see him again between July 6th and July 23rd (Record, 69), and did not know where he was during that period (Record, 70).

Respecting the date of **June 9th**, it appeared by her *cross-examination* that all she knew was that her brother arrived from Europe by the steamer "George Washington" on that day about 11 or 12 o'clock in the morning, and that the prisoner had telephoned to her about the

boat, and that *she did not see him at all on that day* (Record, 71-72, 71, 69-72). For all she knew, he might have been in New Jersey when he telephoned (Record, 71). She did not know where the telephone message came from (Record, 71).—Her testimony is wholly worthless.

LAURENCE R. PRIOR, a partner of the prisoner (Record, 61) in their corporation (Record, 61), testified from a memorandum book that he saw the prisoner on June 10th, 11th, 12th and 13th, 1913, and on July 10th, 11th, 14th and 15th, 1913 (Record, 58-59), at the Terminal Building, New York City (Record, 58-59). On *cross-examination* it developed that there was no memorandum on the date of **July 14th**, but the witness claimed to remember having seen the prisoner on that day because he paid some money to the landlord on July 15th and "the day preceding" the prisoner had impressed on his mind to be sure and see the landlord the next day (Record, 59-60). The witness "thought" he saw the prisoner on this occasion at the Terminal Building (Record, 59-60). He saw him about 1 o'clock (Record, 59) and was with him only about 15 or 20 minutes (Record, 60). The building was connected with New Jersey by a tunnel and a person could go there in 10 minutes (Record, 60-61). This testimony is worthless.

This witness, PRIOR, was subsequently recalled, and testified that he saw the prisoner in New York City on June 5th and **June 9th**, 1913; that on the 9th, he saw him at the Western Union Building between 12:30 and 1 o'clock (Record, 84-85). Notwithstanding that on his prior appearance on the witness stand, he had come there with his memorandum book with the leaves marked with paper between them and all pre-

pared to testify concerning the dates on which he had seen the prisoner and fully prepared on the subject (Record, 84-85) he made no mention of having seen the prisoner on June 9th (Record, 85). He admitted that before being recalled he had been talking to somebody and that it had been impressed upon him that it might be "important" for him to have seen the prisoner on June 9th, and so he returned to the witness stand and testified that he did see him in New York on June 9th (Record, 85).—His testimony is extremely suspicious, to say the least (Record, 84-85, 86-87); and in any event he admitted that he did not know where the prisoner went after he left him in the afternoon of June 9th (Record, 85). He gave no testimony concerning the whereabouts of the prisoner in the forenoon of that day.—His testimony is not only suspicious, but it is also worthless.

FRANK H. KEELER testified that he saw the prisoner on July 12th, 1913, about 10:30 or 11 o'clock in the morning at the Western Union Building, Broadway and Dey Street, New York City (Record, 58). He only saw him for about 10 or 15 minutes and he did not know where the prisoner went when he left him (Record, 59). That was the only day he could recall seeing him "with any positiveness" (Record, 59).—His testimony also is worthless.

MISS CARPENTER testified that she took lunch with the prisoner at the Astor in New York City on January 1st, 1913, and went to a theatre with him on the afternoon of that day, and that he took her home about 7 o'clock (Record, 26-28). She also testified that she saw him on June 12th and June 13th in New York City—that she took lunch with him on the 12th and 13th

and dined with him on the 12th (Record, 27-28); that she saw him in New York City on July 1st—in the afternoon only (Record, 28-29); that she saw him in New York City on July 16th and 17th—had lunch and dinner on the 16th and saw him in the morning on the 17th; that she saw him again on the afternoon of July 28th (Record, 28-29).

“Q. Did you see him at any other time in New York except these occasions to which you have referred? A. No, sir, I did not” (Record, 29).

On *cross-examination*, she testified:

“Q. What days did you see him in the year 1913 in the City of New York? A. I do not know; I have no idea” (Record, 30).

Then she gave a list of dates to which she had testified on direct examination, and said she recalled each one of those dates distinctly, but did not remember and could not give any other date (Record, 29-30). Subsequently she said she saw him in New York “nearly every day,” and “saw him on those nine dates too” (Record, 31-32). She had no idea as to how many days in that year she had not seen him in New York, she had no recollection on the subject, but there were times when she did not see him for a whole week when she was out of town for four months in the summer (Record, 31-32).—Her testimony is worthless.

It was stipulated on the record that an absent witness named CARBERY would testify, if called, that he saw the prisoner at the *Erie Terminal* in New York at some hour not specified in the morning of June 9th (Record, 84).—The Erie Terminal is convenient to New Jersey.

Where the prisoner went when he left Carberry, or where he had been before he met him, is not disclosed.

The testimony concerning the prisoner's whereabouts on June 9th, 1913, has no value whatever. All it shows, at the most, is that he was in New York City on that evening and for half an hour or so in the afternoon and at some time not specified in the morning. We have said that this testimony is worthless—because it does not show that he was not in the State of New Jersey upon that day, nor does it even raise a presumption that he was not there. The same is even more true of July 14th. Testimony directed to the proposition of *alibi* is worthless, unless it is complete. That holds good in extradition cases [*vid. McNichols v. Pease*, 207 U. S. 100, 111].

POINT I.

The prisoner was a "fugitive from justice" within the meaning of the United States Constitution and the Act of Congress, and, hence, there was imposed upon the executive authority of the State of New York the duty of complying with the demand for his surrender.

THE UNITED STATES CONSTITUTION, ART. IV, § 2 provides that:

"A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

This provision established the right to demand and, in cases where the right to demand existed, the correlative obligation to surrender (*Kentucky v. Dennison*, 65 U. S. 66, 103, 104); but it became necessary to provide by law the mode of carrying the provision into execution, and, accordingly, an act of Congress was passed in 1793 (*vid. Kentucky v. Dennison*, 65 U. S. 66, 104; *Lascelles v. Georgia*, 148 U. S. 537, 540; *Innes v. Tobin*, 240 U. S. 127, 130), which was substantially reproduced in U. S. REV. STAT., § 5278 as follows:

“Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear. * * * ”

There are two prerequisites that must appear before the *obligation* to comply with a *demand* for a surrender of an alleged fugitive, made under the Federal Constitution and laws, attaches. These are:

1. That the person demanded is substantially charged with a crime against the laws of the

state making the demand—by an indictment, or an affidavit made before a magistrate, certified as authentic by the executive authority of the state making the demand.

2. That the person demanded is a “fugitive from the justice” of the state, the executive authority of which makes the demand, *i. e.*, that he was physically present in the demanding state at the time of the commission of the crime with which he stands charged, and afterwards departed therefrom—for it is his physical presence there, followed by departure, that constitutes him a fugitive within the meaning of the Constitution and the Act of Congress.

Ex parte Reggel, 114 U. S. 642, 650-652.

Roberts v. Reilly, 116 U. S. 80, 95.

Hyatt v. Corkran, 188 U. S. 691, 711;
aff’g. *People ex rel. Corkran v. Hyatt*,
172 N. Y. 176.

Appleyard v. Mass., 203 U. S. 222, 227.

People ex rel. Meeker v. Baker, 142
App. Div. 598, 600.

People ex rel. Genna v. McLaughlin, 145
App. Div. 513, 516.

People ex rel. Marshall v. Moore, 167
App. Div. 479, 482; aff’d. 217 N. Y.
632.

The FIRST of these prerequisites is a question of *law*, and is always open upon the face of the papers to judicial inquiry in a proceeding instituted by *habeas corpus* (*Roberts v. Reilly*, 116 U. S. 80, 94; *Appleyard v. Mass.*, 203 U. S. 222, 228).—The *extent* of the inquiry in that respect we shall consider later. It is very limited.

The SECOND, it has been repeatedly stated, “is a question of *fact*, which the Governor of the state upon whom the demand ~~is made~~ must decide upon such evidence as he may deem satisfactory.”

Roberts v. Reilly, 116 U. S. 80, 95.
Hyatt v. Corkran, 188 U. S. 691, 710.
Appleyard v. Mass., 203 U. S. 222, 228.
People ex rel. Marshall v. Moore, 167
 App. Div. 479, 482; aff'd. 217 N. Y.
 632.

To the same effect:

Ex parte Reggel, 114 U. S. 642, 652.
Munsey v. Clough, 196 U. S. 364, 372.
Pettibone v. Nichols, 203 U. S. 192, 204.
McNichols v. Pease, 207 U. S. 100, 108.
Marbles v. Creecy, 215 U. S. 63, 68.
In re Strauss, 126 Fed. Rep. 327, 329;
 aff'd. 197 U. S. 324.
Matter of Mitchell, 4 N. Y. Crim. Rep.
 596, 599.
People ex rel. Meeker v. Baker, 142 App.
 Div. [N. Y.] 598, 600.
Farrell v. Hawley, 78 Conn. 150, 153.

Although proof of the fact that the person demanded is a fugitive from justice oftentimes accompanies the requisition, it is not necessary that such proof should accompany the requisition. The statute does not prescribe the character of such proof, nor the mode in which the evidence shall be produced or authenticated (*Ex parte Reggel*, 114 U. S. 642, 651, 652; *Munsey v. Clough*, 196 U. S. 364, 372). The determination of the question rests with the executive of the State to whom the demand for a surrender is presented; and he is not *required* to comply with the demand unless it is made to appear to *him* in some proper way that the person demanded is a fugitive from justice of the State making the demand (*Ex parte Reggel*, 114 U. S. 642, 651, 652; *Matter of Mitchell*, 4 N. Y. Crim. Rep. 596,

599). It "is a question of fact, which the Governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him" (*Munsey v. Clough*, 196 U. S. 364, 372). "Any mode of proof which to him might be satisfactory in kind and convincing in effect and that had a reasonable tendency to establish the fact of a fleeing from justice, fulfilled all the requirements of the law" (*Farrell v. Hawley*, 78 Conn. 150, 153). The fact is "determinable in any way deemed satisfactory by that executive." It may be determined from the requisition papers (*Marbles v. Crecy*, 215 U. S. 63, 67), or "after an original, independent inquiry into the facts" (*McNichols v. Pease*, 207 U. S. 100, 109). It is "a question of fact, which the Governor of the State, upon whom the demand is made, must decide upon such evidence as he may deem satisfactory" (*Roberts v. Reilly*, 116 U. S. 80, 95; *Appleyard v. Mass.*, 203 U. S. 222, 228), and in such way as he deem satisfactory (*McNichols v. Pease*, 207 U. S. 100, 109). If the proof of "flight" does not accompany the requisition, the governor of the surrendering state may satisfy himself, by competent proof—strict common law evidence is not required (*Munsey v. Clough*, 196 U. S. 364, 372)—on that point before he is bound to comply with the demand—before the obligation to surrender imposed by the Federal Constitution and Laws devolves upon him (*Ex parte Reggel*, 114 U. S. 642, 651, 652; *McNichols v. Pease*, 207 U. S. 100, 108).

The Governor's warrant—whether it recites a finding of the facts or not—is *prima facie* evidence that all essential legal prerequisites * to

* In this point we shall assume, for the purpose of the argument, that the power to surrender is coincident with the duty or obligation. We shall hereafter contend that a State, by

its issuance have been observed. It creates a presumption that the imprisonment of the prisoner and the direction for his delivery are lawful and valid; and this presumption holds good until it is overthrown by contrary *proof*.

McNichols v. Pease, 207 U. S. 100, 109.
Appleyard v. Mass., 203 U. S. 222, 227.
Munsey v. Clough, 196 U. S. 364, 372.
Roberts v. Reilly, 116 U. S. 80, 95.
People ex rel. Marshall v. Moore, 167
 App. Div. [N. Y.] 479, 482; aff'd. 217
 N. Y. 632.

The burden of overthrowing the presumption created by the warrant rests upon the prisoner. Of that there can be no question.

Bassing v. Cady, 208 U. S. 386, 392.
McNichols v. Pease, 207 U. S. 100, 109.
Appleyard v. Mass., 203 U. S. 222, 229.
Hyatt v. Corkran, 188 U. S. 691, 709-710.
Roberts v. Reilly, 116 U. S. 80, 95.
People ex rel. Marshall v. Moore, 167
 App. Div. 479, 482; aff'd. 217 N. Y.
 632.
*People ex rel. Hamilton v. Police
 Comm'r.*, 100 App. Div. 483, 485.
Reed v. United States, 224 Fed. Rep.
 378.
In re Keller, 36 Fed. Rep. 681, 686.

The prisoner cited the case of *Ex parte Reggel* (114 U. S. 642), as holding that the burden

virtue of its inherent—and reserved—sovereign power, may surrender a person to another State even though it is not, by the Federal Constitution and Laws, *required* so to do—that the Constitution merely *obliges* the States to do in some cases what they may do in any case.

was upon the respondent in the *habeas corpus* proceeding to show that he was a fugitive from justice. The case holds nothing of the kind. What it does hold is that before the Governor of the surrendering state is bound to issue his rendition warrant—before the duty imposed by the Federal law devolves upon him—he must have proof before him that the accused was in the demanding state at the time of the commission of the crime and afterwards departed therefrom, and is thus in fact a “fugitive from justice” within the meaning of the Constitution and the Act of Congress.—But when the Governor has issued his warrant, it must be assumed, in the absence of proof to the contrary, that all the prerequisites necessary to its issuance were made to appear. And the burden is upon the prisoner to show that these prerequisites were in fact not made to appear.

This, it may be remarked, is in accordance with the general rule of the local law that one who is held in custody by a process valid on its face has the burden of impeaching its validity by showing a want of jurisdiction to issue it.

People ex rel. Tweed v. Liscomb, 60 N. Y. 559, 571.

People ex rel. Danziger v. House of Mercy, 128 N. Y. 180, 185.

People ex rel. Forbes v. Markell, 92 Hun 286, 288.

Matter of Henry, 13 Misc. 734, 735, 736.

The prisoner, under the local practice, must *traverse* the return and by appropriate allegations of fact set forth wherein the lack of jurisdiction exists. The interposition of a traverse is essential to raise an issue; and the inquiry is

confined to the issues raised thereby (*People ex rel. Danziger v. House of Mercy*, 128 N. Y. 180, 189; *People ex rel. Evans v. McEwen*, 67 How. Pr. 105, 111; Code Civ. Pro., § 2039). The burden is upon the prisoner to support the allegations of his traverse by proof (*Matter of Henry*, 13 Misc. 734, 736) [Cases cited *supra*]. He is held to strict proof of the facts alleged to constitute a lack of jurisdiction (*People ex rel. Sinkler v. Terry*, 108 N. Y. 1, 12).

Assuming, then, that the prisoner was entitled to challenge the jurisdiction of the Governor of New York to issue the rendition warrant upon the ground that there was *no proof* before *him* of the fact that the prisoner was a fugitive from justice (*Ex parte Reggel*, 114 U. S. 642, 651), it is obvious that, if he adopted that method of procedure, it was incumbent upon him to raise the question by an appropriate allegation in his traverse to the return, *and* to support such an allegation by putting in evidence the *whole proceedings* before the Governor respecting the question of his physical presence in and subsequent departure from the demanding state. It would not be enough to merely put in evidence the *requisition and the papers accompanying it*—for, as we have already pointed out, it was in no way essential that the proof of “flight” should accompany the requisition of the demanding Governor.

In the case at bar the prisoner—we repeat and emphasize—did *not* allege in his traverse a lack of evidence before the Governor of New York to show that he was a fugitive from justice; nor did he offer any proof that there was such a lack of evidence. Hence, it must be conclusively presumed that the jurisdictional facts

necessary to the issuance of the rendition warrant were made to appear before the Governor of New York.

The prisoner, however, had another method of procedure open to him. And that method he adopted. He, it has been held, was entitled to show in the *habeas corpus* proceedings that he was not *in fact* a fugitive from justice, and *thus* overcome the presumption arising from the Governor's warrant.* If he adopted that method he likewise had the burden of proof; and the nature and extent of the burden which he carried has been frequently declared. He was bound to show by evidence that was **practically conclusive**, that he was in fact *not* a fugitive from justice.

Hyatt v. Corkran, 188 U. S. 691, 710.

Munsey v. Clough, 196 U. S. 364, 374-375.

McNichols v. Pease, 207 U. S. 100, 112.

The view taken in *People ex rel. Genna v. McLaughlin* (145 App. Div. [N. Y.] 513) that the ordinary rule of preponderance of evidence applies to such a proceeding is, we submit, unsound, and is not in accord with the views which have been frequently expressed by this court. Besides, a critical examination of that case shows that the reason for the reversal was that the Special Term, although it reached the conclu-

* This procedure, though anomalous in that it transfers to the judiciary the performance of a function devolved by law on the executive and enables the judiciary to apply a corrective by determining *de novo*, upon evidence produced before it, the question whether the accused was in fact a fugitive from justice, and thus practically to supersede the Governor, has, it would seem, been sanctioned by decision both in the State and Federal courts (*People ex rel. Genna v. McLaughlin*, 145 App. Div. 513; *Biddinger v. Police Commr.*, 245 U. S. 128).

sion that the prisoner was not in the demanding State at the time of the commission of the crime, had, nevertheless, "*declined to make a determination*" of the question of fact, holding that, by reason of the fact that the evidence was conflicting, and that there was evidence showing the physical presence of the accused in the demanding State, it was precluded from deciding the question, no matter how convincing or practically conclusive the evidence of non-presence might be.—The case was remitted to the Special Term to determine the issue of fact.

The expressions in the opinions of THIS COURT are of the tenor that it is only when "it is clearly shown that the relator is not a fugitive from justice, and *there is no evidence from which a contrary view can be entertained*" that the court will discharge him from imprisonment; that he must show "*by admissions * * ** or *by other conclusive evidence* that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed" (*Hyatt v. Corkran*, 188 U. S. 691, 710). It is only "when it is *conceded*, or when it is *so conclusively proved*, that *no question can be made* that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding state" that the court will be justified in discharging the prisoner (*Munsey v. Clough*, 196 U. S. 364, 374-375). He "should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice" (*McNichols v. Pease*, 207 U. S. 100, 112). In short, the proof must amount

to demonstration.—This may, with truth, be said to be a rule of substantive law.

The determination of the question rests in reality with the Governor of the surrendering state. It is *he* who is charged with the responsibility of determining whether the person demanded as a fugitive shall be surrendered—whether he is in fact a “fugitive from justice.” The true function of a writ of *habeas corpus* is not to give the Court an opportunity to substitute its judgment on this question of *fact* for that of the Governor. It is to determine whether there was any basis for the Governor’s action—to determine whether he had *jurisdiction* to issue his rendition warrant. The warrant *prima facie* establishes jurisdiction. In order to succeed the prisoner is bound to show that the jurisdictional requirement is, in fact, totally non-existent.* A mere preponderance of evidence in the prisoner’s behalf will *not* suffice. He must *destroy the basis* upon which the order or warrant for his removal rests. And this he can do only either by showing that there was no evidence before the Governor that he was a fugitive from justice, or by proving *conclusively* that, in fact, he is not a “fugitive.” Indeed, according to the views expressed by BALDWIN, J., speaking for the Supreme Court of Connecticut—and his views would seem to have a solid foundation in logic and in law—the prisoner, in order to be in a position to claim a discharge from custody under a ren-

* In the *Corkran-Hyatt* case (172 N. Y. 176; 188 U. S. 691) it was *conceded* that the accused was not in the demanding state when the crime was committed [188 U. S. 719]. The extradition warrant was granted and sought to be sustained on the specific theory that a “constructive presence” would necessitate compliance with the demand for his surrender.

dition warrant—or, to defeat the right of the demanding state to demand his surrender—should establish both of these propositions (*Farrell v. Hawley*, 78 Conn. 150, 155)—a proposition which finds support in the opinion of this Court in the *Corkran-Hyatt* case (188 U. S. 691, 711).

What is a “fugitive from justice” within the meaning of the Constitution and the Act of Congress?

A person who was physically present in the demanding state at the time that the crime with which he is charged was, if ever, committed, and who thereafter departs from that state and, when sought to be subjected to its criminal process, is found in the territory of another, irrespective of what his motives were in leaving the state or of any knowledge on his part of having committed an unlawful act or participated in a crime, is a “fugitive from justice” with the meaning of the Constitution and the Act of Congress—giving the right to demand and imposing the correlative obligation to surrender.

Appleyard v. Mass, 203 U. S. 222.

Bassing v. Cady, 208, U. S. 386, 392.

Biddinger v. Police Commissioner, 245 U. S. 128, 133, 134.

Reed v. United States, 224 Fed. Rep. 378.

It is sometimes stated that one who “commits a crime” within a state, and thereafter departs therefrom is a fugitive from justice (*In re Voorhees*, 32 N. J. L. 141, 150—*Appleyard v. Mass.*, 203 U. S. 222, 229, 231). That is an instance, not a definition. The question is not whether he committed a criminal act or participated in a crime within the state, for that is a question which goes to his guilt or innocence—which is

never open to inquiry in proceedings of this nature (*People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 193; *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, 443; *Munsey v. Clough*, 196 U. S. 364, 375; *In re Strauss*, 197 U. S. 324, 333; Note 21 L. R. A. [N. S.] 939),—but whether he was physically present in the demanding state at the time that the crime of which he is *accused* was (if ever) committed.

It is wholly immaterial what his motives were in leaving the state, or that he was returning to his home in the surrendering state or that he had no conscious purpose of avoiding arrest or prosecution or consciousness of having committed a crime.

Biddinger v. Police Commissioner, 245 U. S. 128, 133.

Drew v. Thaw, 235 U. S. 432, 439.

Appleyard v. Mass., 203 U. S. 222, 230-232.

Roberts v. Reilly, 116 U. S. 80, 94.

Kingsbury's Case, 106 Mass. 223, 227, 228.

Bassing v. Cady, 208 U. S. 386.

In re Keller, 36 Fed. Rep. 681, 686.

In re White, 55 Fed. Rep. 54, 57.

It is not essential in order to constitute a person a fugitive that he should remain in the state or be present in the state until the crime is consummated, or that he should be physically present at the time of its consummation. It is enough that he was present at the time of the commission of any part of the crime.

In re Sultan, 115 N. C. 57.

In re Cook, 49 Fed. Rep. 838; *aff'd.* as *Cook v. Hart*, 146 U. S. 183.

State ex rel. Rinne v. Gerber, 111 Minn. 132, 135-136.

Strassheim v. Daily, 221 U. S. 280.

People ex rel. Meeker v. Baker, 142 App. Div. [N. Y.] 598.

Matter of Hoffstot, N. Y. L. J., May 24, 1910 [Opin. of Hughes, G.]; 180 Fed. Rep. 240; 218 U. S. 665.

In *In re Sultan (supra)* the extradition of the prisoner was sought by the State of Pennsylvania from the State of North Carolina. He was charged with obtaining goods by false pretenses. It appeared that the false pretenses were made on September 17, 1892. The goods were not obtained by the defendant until October 6, 1892, when they were delivered to a common carrier for shipment to him. He was not in the State of Pennsylvania at the time the goods were delivered—that is, when the crime was consummated. He had left the state after the making of the false pretenses and before the delivery of the goods. It was held that he was extraditable and that it was not necessary that he should remain in the state until the crime was consummated or be there at the time of its consummation, and that a departure from its jurisdiction after an act was committed in furtherance of a crime, which was subsequently consummated, rendered him a fugitive from justice.

In *In re Cook (supra)* the defendant was charged with embezzlement. He was a banker and his crime consisted in receiving a deposit knowing the bank to be insolvent. He was not in the demanding state at the time the deposit was received, but he was in the state some days before the receipt of the deposit, and at that time

he gave general directions regarding the receipt of deposits. It was held that notwithstanding the fact that he was not in the state when the deposit was received of which the crime charged in the indictment was predicated, he was, nevertheless, a fugitive from justice—because he was within the state at the time an act was committed which tended to result in a consummated crime after his departure.

In *State ex rel. Rinne v. Gerber (supra)*, the relator was indicted in Iowa for wife desertion. The indictment laid the date of the crime on "*March 8th, 1910, and prior thereto.*" A requisition for the surrender of the accused to the State of Iowa as a fugitive from justice was made on the Governor of Minnesota. The Governor of Minnesota issued a rendition warrant. The relator sued out a writ of *habeas corpus*, claiming that he was not a fugitive from justice. The facts were these: It was conceded that the relator was in Minnesota [the surrendering state] on March 8th, 1910, and that he had been in that State "*for nearly a year prior thereto.*" He had come to Minnesota in April, 1909, and taken up his residence there, leaving his wife and family in Iowa. When he arrived in Minnesota he changed his name. It was admitted that he left a sum of money with his wife when he departed from Iowa and that his wife had since that time occupied a home owned by him in Iowa. He claimed that he had come to Minnesota with the consent of his wife and that before coming there he gave his wife, in addition to the money referred to, a promissory note for \$1100, an automobile, outstanding accounts amounting to \$100 to \$150 and \$40 in cash, and that since he came to Minnesota he had remitted to his wife about \$100, and that she had never requested him to

support her. It was held that notwithstanding the fact that the Iowa statutes made non-support an essential element of the crime of desertion and that there was no failure to support till after the relator came to Minnesota, he was, nevertheless, a fugitive from justice—that the crime of desertion, as defined by the Iowa law, was necessarily *continuing*, and that his departure from Iowa, followed, as it was, by a *subsequent* failure to support his wife, constituted him a fugitive from justice; and, accordingly, the rendition warrant was upheld.—His intent in leaving Iowa was a question for the courts of that State.

In *Strassheim v. Daily* (*supra*) the prisoner was held under an extradition warrant of the Governor of Illinois issued upon a requisition from the Governor of Michigan. The indictment was for bribery and obtaining money by false pretenses. The dates laid therein were May 13th and May 1st respectively. It appeared that on both those dates the prisoner was in Chicago. He had, however, been in the State of Michigan at the time when acts in the scheme which, though innocent in themselves, might become retrospectively guilty when the result ensued, were committed. It was held that it was not necessary that the accused should be in the demanding state at the time of the consummation of the crime, and that it was enough that he was there when steps were taken towards the accomplishment of the criminal purpose. Having incurred guilt there, and then left the State, he became a fugitive [p. 285]. And if he was in the State, “in the neighborhood of the time alleged,” that was enough.

A notable extension of the rule illustrated by and applied in the foregoing cases, finds expres-

sion in cases of **conspiracy** where it has been held that it is sufficient to show the prisoner's physical presence in the demanding state at some time during the period over which the conspiracy extended, and when it was in course of operation.

People ex rel. Meeker v. Baker, 142 App. Div. [N. Y.] 598.

Matter of Hoffstot—Opin. of Governor Hughes, N. Y. L. J., May 24, 1910—sustained 180 Fed. Rep. 240, aff'd. 218 U. S. 665.

In *People ex rel. Meeker v. Baker* (*supra*) the relator was taken into custody under an extradition warrant issued by the Governor of New York upon a requisition from the Governor of Texas. The indictment accompanying the requisition was for CONSPIRACY. The conspiracy was charged to have been committed "on or about January 26, 1910." The co-conspirators named with Meeker in the indictment were two men named Richey and Perkins. It appeared by the evidence before the Governor, that on January 15, 1910, the relator, Meeker, left New York. He went to visit Richey at Clayton, N. M., where Richey lived. He arrived there on January 25th and spent four days there. The place where the crime was alleged to have been committed was at Texline in the State of Texas, which was just over the border and about ten miles from Clayton. Meeker denied that he had ever been in the State of Texas during that trip. It appeared, however, on his cross-examination, that he had made a memorandum in a notebook under date of January 22, 1910, to the effect that he "drove to Texline, Tex."; but he swore that he thought that the memorandum might be incorrect, that they were driving out to look at land and were out

towards the Texas line or perhaps near it, but that he did not know whether he had actually reached it or not. Evidence was offered in behalf of the State to the effect that Meeker was in Dalhard, Texas, on January 22nd. There was also some evidence (denied by Meeker) to the effect that Richey had stated in Meeker's presence that they had been down to Texline, Texas, and that Meeker had not denied the statement. There was some evidence tending to show that Richey and Meeker had driven over the Texas border and passed through the town of Texline on the drive on January 22nd. It was held that it sufficiently appeared that the relator was a fugitive from justice within the meaning of the law. The Court said:

"He was with Richey in Texline at the time of the commission of the offenses in question, **and during the accomplishing of the purposes of the conspiracy**, for the indictment is not limited to the date of January 26, 1910, but charges the commission of the offenses on or about that date."

The Court then referred to the *Hoffstot* case saying:

"In the *Matter of Hoffstot* the Governor of the State of New York had before him a requisition for the surrender of a person indicted for conspiracy on a specific date alleged in the indictment, being June 3, 1908. There was no proof that the person was within the State of Pennsylvania, the demanding state, on that date, but there was evidence that he had been within that state on May twenty-eight. The Governor held that upon the trial the precise date alleged in the indictment would not be material, and that the state could prove the commission of the crime at a different date; that in conspiracy cases in particular the proof was generally circumstantial and consisted of various acts and

circumstances from which the unlawful agreement constituting the conspiracy could be inferred, and that the proof ordinarily extended to acts committed through a considerable period of time, the precise date being frequently difficult to determine; he held that since Hoffstot was in the State of Pennsylvania during the period over which the conspiracy extended, and since there were circumstances justifying the inference that acts were committed while he was in the State of Pennsylvania which might be considered to have had some relation to the conspiracy, he was extraditable. (N. Y. L. J., May 24, 1910.)"

In *Matter of Hoffstot* (N. Y. L. J., May 24, 1910) * a requisition was made by the Governor of Pennsylvania on the Governor of New York for the surrender of Hoffstot as a fugitive from justice. The crime charged in the indictment was CONSPIRACY. The offense was alleged in the indictment to have been committed on a specific date—June 3, 1908. *No other date or time was alleged.* There was no *continuando*. Governor HUGHES held a hearing before honoring the requisition. The accused showed, without contradiction, that he was *not in the State of Pennsylvania on the date laid in the indictment.* Counsel for the State of Pennsylvania admitted that they could not controvert the evidence of that fact. It was, therefore, practically *conceded* that Hoffstot was *not* in the State of Pennsylvania on the date laid in the indictment. Governor HUGHES stated in his opinion:

"But it is the contention of the Commonwealth of Pennsylvania that it is not limited to the pre-

* The opinion of Governor Hughes will also be found in the *Hoffstot* Record on Appeal in this Court at pp. 35-43 (Oct. Term, 1909, No. 962; Record No. 22188).

cise date mentioned in the indictment, and that the crime was not committed on that particular day, **but during a period extending through May and June, 1908.**"

In order, then, to aid the allegations of the indictment, and to show that Hoffstot was in the State of Pennsylvania *at the time of the commission of the crime*, the State of Pennsylvania introduced evidence tending to show that the crime charged in the indictment was—or rather that the proof of the crime would be—predicated of acts committed during the period extending over the months of May and June, 1908, and that it was, in effect, in course of commission during that period. This was coupled with proof that Hoffstot was in the State of Pennsylvania on May 28, 1908, and on June 29 and June 30, 1908. It seems also that there was some evidence tending to show the commission of acts in the State of Pennsylvania on those dates, which acts might be deemed to have had a relationship to the conspiracy.—But such evidence was not strictly essential from a legal standpoint.

Governor HUGHES discussed the matter at considerable length, pointed out that the crime of CONSPIRACY was a peculiar crime and that it was difficult to fix any precise date upon which it could be said to have been committed, that the proof of it often consisted of a number of acts extending through a considerable period of time. He said, among other things:

"The crime here alleged is conspiracy to bribe municipal officers. It would not be necessary to prove that the crime was committed on a particular day. It may be proved by circumstantial evidence, and its very nature frequently makes a crime of this sort susceptible of none other. * * *

"It is not unusual to find in such cases that

it is necessary to prove acts of the alleged conspirators extending through a considerable period of time, the evidence of which may furnish a sure basis for the conclusion that the crime charged has in fact been committed. There is no rule of law which confines the proof to a particular day, much less to the precise day set forth in the indictment.

"In view of the statements in the presentment and those made upon the hearing before me, I must conclude that the charge which the accused, if surrendered, would be called upon to meet under the indictment, is not limited to the third day of June, 1908, but would **embrace an extended period covering the months of May and June in that year.**

"The first question, then, is whether, whatever may be the fact as to the time to which the charge actually relates or the showing upon this point before the executive of the state where the accused is found, the demanding state in a proceeding of this sort is absolutely bound by the date specified in the indictment. In an extradition proceeding must the executive determine the question whether the accused is a fugitive from justice solely with reference to that date? I do not so understand the law.

"Undoubtedly where there is nothing before the executive to show that the charge relates to any other time, he is justified in refusing to surrender the accused if it clearly appears that on the date specified the accused was not within the demanding state."

The learned Governor then considered the *Corkran-Hyatt* case [172 N. Y. 176; 188 U. S. 691] and pointed out that in that case it was conceded that the accused was *not* within the demanding state *at the time the crime was actually committed*, and that the extradition warrant had been sought and *granted* solely upon the theory that a "constructive presence" would suffice—to impose the constitutional obligation. He continued:

“But the *Hyatt* case did not decide that where it appears that the crime charged was committed at another time than that specified in the indictment this cannot be considered by the executive upon a demand for rendition. Upon the contrary, such a holding was distinctly negated.”

After referring to the opinion in that case, he quoted as follows from the opinion of this Court:

“The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments; and when those facts are proved so that there is no dispute in regard to them and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed.”

He then cited authorities showing that the demanding state was *not* necessarily limited to the specific date laid in the indictment—even where the indictment charged only a specific date—but that the question involved in proceedings of this kind was not whether the accused was in the demanding state upon the date laid in the indictment but whether he was there *at the time that the crime was committed*. It is the time of the actual *commission* of the crime that is material, not necessarily the specific date laid.—Of course, it may be that where the indictment charges *only a specific date* and no claim is made, and there is nothing to show, that the crime was actually

committed at some other time, the state would (when the date is capable of exact ascertainment)* be bound by the specific date and the question decided with reference thereto. The learned Governor continued:

“The date alleged in the indictment is frequently selected arbitrarily. If there is no claim that the offense was committed at another time, of course the date alleged is the only time before the executive and he must make his decision accordingly. But if it satisfactorily appears that a charge relates to another time and that the accused is a fugitive from justice, with respect to the actual charge, there is no public policy in making it necessary to have a new indictment found, with a more exact reference, in order that rendition should be had. Insistence upon this might frequently cause a miscarriage of justice and such a rule would not accord protection to any substantial or proper interest of the accused.” †

He then pointed out that a faithful and vigorous enforcement of the constitutional provision relating to fugitives from justice was essential to the welfare of the states [*vid. Appleyard v. Mass.*, 203 U. S. 222, 228; *McNichols v. Pease*, 207 U. S. 100, 112], and continued:

“Such faithful, vigorous enforcement cannot well be had if the time to which the charge actu-

* Even with respect to crimes other than conspiracy it is not necessary to show the physical presence of the accused in the demanding state on the exact date laid, nor is it necessary to show another specific date as that of the actual commission of the crime and the physical presence of the accused on that date, for the date of actual commission may not be capable of exact ascertainment, and a physical presence in the neighborhood of the time of the probable commission of the crime will suffice.

† See also Opin. of Mr. Justice Holmes in *Strassheim v. Daily*, 221 U. S. 280, 285-286.

ally relates be disregarded and the formal specification in the indictment be treated as controlling. The rights of the accused in an extradition proceeding are no more sacred than those of the defendant upon the trial for crime. The precise date may be disregarded in the latter, and it should not be deemed absolutely binding in the former.

"I conclude, therefore, that the question in the present case is not simply whether the accused was in the State of Pennsylvania on June 3, 1908, but whether he is a fugitive from justice with respect to the charge of conspiracy, committed in the spring of 1908, and during a period embracing the months of May and June in that year."

Then, after pointing out that neither the guilt nor the innocence of the accused, nor his motives in leaving the state, nor such like considerations were material, he said:

"It must be deemed sufficient that it appears that the accused was within the demanding state at or during the time to which the charge relates and in circumstances which do not negative his participation in the crime.

"Where the charge is conspiracy, as in the present case, a crime which may be shown by circumstantial evidence involving the proof of various acts of the several parties, it is idle to say that the accused cannot be considered a fugitive from justice unless it is shown that while he was within the demanding state, at the place and during the time to which the charge relates, he performed an act sufficient to show his participation in the crime. Whether his acts within that state during the period in question are of a character to justify his conviction must be determined by a consideration of all the evidence, which can satisfactorily be produced only upon the trial, and cannot properly be heard or weighed on an application of this kind. At least this would seem to be clear where his presence in the state at the time to which the charge relates was not under condi-

tions which establish the impossibility of his participation.

Viewed in this light I am convinced that I should honor the requisition."

This *Hoffstot* case has become a landmark in the law of interstate rendition. The learned Governor of New York (afterward a justice of this Court) saw with the clearest vision and pointed out in the clearest manner that the question involved in a rendition proceeding, in determining whether the accused was a "fugitive from justice,"—so as to impose the obligation to surrender him—was not whether he committed a criminal act in the demanding state, but simply whether he was in that state when the crime was committed; and, applying this principle, he concluded that in a case where the crime charged was of a *continuing* nature, the test was to ascertain whether or not at some time, during the period of its continuation—*i. e.*, the time when the crime was in course of commission—the accused was within the demanding state; and that unless his presence there was under conditions which established the impossibility of his participation in the crime, he must, by reason of the fact of his presence during the period of the commission of the crime, be deemed a "fugitive from justice" within the meaning of the Federal rendition laws. This decision is in harmony with the broad and liberal interpretation of the constitutional provision which the courts have deemed essential to carry out its purpose.

There is nothing in the *Armour* case, decided by GOVERNOR FORT of New Jersey [see opinion N. Y. L. J., May 25, 1910] which militates against this. In that case, Armour was indicted in New Jersey for the crime of conspiracy—to enhance

the price of meat. The opinion of Governor FORT was rendered, not in refusing a demand from another state for Armour's surrender, but in declining to make a requisition upon the Governor of Illinois for his surrender to the State of New Jersey. The circumstances under which Armour was in New Jersey were these: He came into the state to take a steamer to Europe at the docks in Hoboken, went on board the steamer there, and landed there on his return. These circumstances, the Governor held, were such as established, to his satisfaction, the fact that Armour's presence in the State of New Jersey had no relation to the crime charged, and, in view of the nature of the crime charged, was such as *negatived the possibility* of his participation therein on those occasions.

Governor HUGHES recognized such a case when, in his opinion in the *Hoffstot* case, he stated that the accused's presence in the demanding state during the period of the continuity of the conspiracy would suffice as a basis of a demand for his surrender unless it was under conditions which *established the impossibility* of his participation in the crime—a proposition which, Governor FORT held, the facts in the *Armour* case did establish.

Besides, it must be remembered that the opinion of Governor FORT was rendered in exercising his discretion not to request the surrender of Armour from another state.* And he, too,

* A governor of a state has a discretion as to whether he will demand the surrender of a fugitive—but a governor to whom a demand for a surrender is presented has no discretion to refuse it; he must comply with it, if it is in conformity with the law (*Kentucky v. Dennison*, 24 How. 66; *Drew v. Thaw*, 235 U. S. 432, 439). The duty is not always performed. But that does not impair the fact that it exists.

recognized that a presence in the state at some time during the period of a conspiracy would suffice unless it was under circumstances that negated the possibility of the accused's participation in the crime [see opinion of Fort, G., N. Y. L. J., May 25, 1910].

The decision of GOVERNOR HUGHES in the *Hoffstot* case was sustained on *habeas corpus* by the U. S. District Court (*Ex parte Hoffstot*, 180 Fed. Rep. 240), and the decision of that Court was affirmed by this Court with the statement that "No further opinion will be delivered" (*Hoffstot v. Flood*, 218 U. S. 665).

We have indicated that even though a specific date is laid in the indictment, the demanding state is not necessarily limited to that date. It is only limited to that date when it represents the date of the actual commission of the crime and when the date of the actual commission of the crime is capable of being exactly ascertained. When the date is not capable of exact ascertainment, the demanding state is not limited to the specific allegations of time laid in the indictment—either on the trial or in extradition proceedings. This is clearly pointed out in the above opinion of GOVERNOR HUGHES wherein he also said:

"In *McNichols v. Pease* (207 U. S. 100), the charge, shown by affidavit, was that the accused committed the crime of larceny in Wisconsin on September 30, 1905. He sought to prove that he was in Chicago on the precise day alleged. While this proof was deemed insufficient on this point, still the point was not conceded to be controlling. Mr. Justice Harlan, in delivering the opinion of the court, said (on p. 110): 'It is said that the plaintiff in error was not in the State of Wisconsin on the day when the alleged larceny from the person of Hansen was com-

mitted; therefore, it is contended, he could not have committed the crime charged, and thereafter become a fugitive from the justice of that state. If the authorities of Wisconsin were bound by the date named in the requisition papers, which we do not concede (1 Pomeroy's Archbold's Cr. Pr. & Pl. 363), still the record presents no such case as is contended for by the accused.'

"Similarly in *Hayes v. Palmer* (21 App. Cas. Dis. Col. 450), the alleged *alibi* was not satisfactorily established with respect to the precise date charged, but the court evidently did not regard the demanding state as limited to that date, if it should appear that in fact the charge related to another time. The Court said (*id.*, p. 462): 'For example, suppose the case of a party indicted for a secret murder that had been brought to light, long after its commission, by the discovery of the partly decomposed body or the skeleton of the murdered person; the evidence being entirely circumstantial, and the date of the commission of the crime a matter of conjecture on the part of the grand jury. The accused, having been arrested in another state as a fugitive from justice, testifies that he was not in the demanding state on the day alleged, but had been there shortly before, and frequently during the same summer, failing, however, to fix the latter dates at all. Would this evidence be sufficient to impose upon the demanding state the burden of introducing witnesses to prove the various circumstances from which it might reasonably be inferred that the murder had occurred, shortly before the date alleged in the indictment? We think not.' "

In the *Corkran-Hyatt* case it was *conceded* that the accused was not in the demanding state *at the time of the commission of the crime*. His subsequent presence in the demanding state was *after* the crime had been *fully consummated* and had no relationship whatever to the crime. The extradition was, as we have said, granted and the

right of the state of Tennessee to *demand* a surrender sought to be sustained upon the specific proposition that a "constructive presence" would suffice to impose upon the Governor of New York the obligation to surrender. What this Court *decided* was that it was essential that the accused should be present in the demanding state, not necessarily on the date laid in the indictment, but *at the time of the commission of the crime*—before the *obligation* to surrender arose. The case negatives the idea that the date laid in the indictment, even though only a single date be alleged, is necessarily controlling.

The BASIC PROPOSITION underlying the decision of Governor HUGHES in the *Hoffstot* case is that where the crime charged is of a continuous nature and extends over a considerable period of time, the presence of the accused in the state at any time during such period, followed by his departure, will suffice to render him a fugitive within the meaning of the Constitution—unless his presence was under conditions which *establish the impossibility* of his participation in the offense.

Coming now to apply the principle of these cases to the present case, we find:

1. In the first place, and with reference to the first five counts of the indictment, in which the time is laid as June 9th and July 12th and "on or about July 12th," we have circumstantial evidence tending to show the prisoner's presence in the State of New Jersey on June 9th, 1913, and July 14th, 1913. This evidence consists of the checks drawn by him on the Little Falls National Bank, Little Falls, N. J., to the order of his co-conspirator under his *alias* names; and these checks were themselves parts of the *res*

gestae of the conspiracy. The presumption arising from this evidence was not overcome by the prisoner by any convincing proof—for, excepting his own testimony, there is no evidence legitimately tending to show his non-presence in the State of New Jersey on those dates (*vid. McNichols v. Pease*, 207 U. S. 100, 111).

2. Passing now directly to the SIXTH COUNT of the indictment—for it is on this count that we base our main contention—we find that, with respect to “**time**,” its allegations are that the prisoner and his co-defendant conspired.

“on or about the first day of January, in the year of our Lord one thousand nine hundred and thirteen, and on divers other days between that day and the day of the taking of this Inquisition” (Record, 96).

The caption shows that the inquisition was taken at the January Term, 1914, of the Oyer & Terminer (Record, 89).

The indictment is for CONSPIRACY—a *continuous* offense. Thus—as we shall presently demonstrate—the offense is alleged to have been continuously in course of commission during the year 1913.

The case at bar is stronger than the *Hoffstot* case. In the *Hoffstot* case the indictment charged only a specific date. It was necessary to supplement the indictment by proof to the effect that the crime charged therein was in course of commission during an extended period of time. In the case at bar the indictment specifically alleges a *continuing* conspiracy. Therefore it needs no extrinsic proof to aid the allegations with respect to time or to show what was the time of the actual commission of the crime. The crime

was actually in course of commission, *according to the allegations of the indictment itself*, during the year 1913. The presence of the prisoner in the demanding state on three occasions during the period of continuity is undisputed. And the circumstances under which he was there did not establish the impossibility of his participation in the crime.

It is urged by the accused that the above allegation is not a good *continuando*. The objection advanced against it is two-fold. It is contended (1) that it is not a sufficient allegation that the crime was *continuously* in course of commission during the period mentioned—that the allegation is an allegation of an “intermittent” rather than a “continuous” conspiracy. And as a part of the same general objection it is contended (2) that the period of continuity is not laid with *certainty* in that the “day of the taking of this Inquisition” is not stated *in* the indictment.

We purpose now to show that these contentions are untenable—to show: (1) That the *continuando* is good in law, is *certainly* laid and is a proper and sufficient allegation of a continuing conspiracy, *i. e.*, of a conspiracy which was continuously in course of commission during the period covered by the *continuando*—a period definitely stated; and (2) that such a conspiracy as is alleged is a crime of a truly continuous nature as distinguished from a series of intermittent acts. The crime itself is continuous. The acts, which occur from time to time, are but the outward manifestations of the existing and continuing unlawful agreement, confederation and partnership, which constitutes the essence of the crime,—which continues uninterruptedly in existence until the fulfillment of its purpose, or the aban-

donment of the design. And it continues as to each party to it until its fulfillment or until he, by affirmative action, withdraws himself from the execution of its purposes.

1. Laying time and continuity in indictments for "continuous" offenses.

The general rule, as deduced from the authorities, is that if an offense may have continuance, the time may be laid with a *continuando*—that is, it may be laid on a day certain and on divers other days between that day and another day certain; and this will be taken as charging a single offense continuing during that period.

Wells v. Comm., 12 Gray [78 Mass.] 326, 327.

Comm. v. Tower, 8 Met. [49 Mass.] 527.

Comm. v. Sheehan, 143 Mass. 468.

State v. Cofren, 48 Me. 364.

State v. Brown, 14 N. D. 529, 530, 531.

State v. Lesh, 27 N. D. 165, 171-172.

Our House No. 2 v. State, 4 Greene [Iowa] 172.

Richardson v. Northrup, 66 Barb. 85, 87.

In *Wells v. Comm.* (*supra*) the indictment was for keeping a house of ill fame. The offense was charged as a continuous one. The Court said [p. 327]:

“And when, as in the present case, the alleged offense may have continuance, the time may be laid with a *continuando*; that is, it may be alleged to have been on a single day certain and also on divers other days. But those other days must be alleged with the same legal exactness which is required in alleging a single day. Such exactness is obtained by alleging that the of-

fense was committed on a day certain and on divers other days between two days certain. If the other days are not alleged with the same certainty as the first day is, the indictment is insufficient, unless the allegation of the other days can be wholly disregarded, and rejected as surplusage."

The Court held that where the offense was alleged to have been committed on a day named and "*on divers other days and times*" between the day named and another day named or described with sufficient certainty, there was no surplusage and that the indictment charged a *continuous* offense continuing during the period between the two dates.*

In *State v. Brown (supra)* the Court said:

"The defendant was tried and convicted of the crime of maintaining a liquor nuisance, and has appealed from the judgment. The information alleges that the offense was committed on the 1st day of January, 1904, 'and on divers and sundry days and times between that day and the 24th day of April, A. D. 1905, and on the 24th day of April, A. D. 1905.' * * * It is claimed that the foregoing allegations quoted from the information render it uncertain as to time and place and cause it to charge more than one offense. * * * The allegation as to time is proper and sufficient in a case like this which charges a **continuing offense**. The allegation is equivalent to a statement that the nuisance was maintained on the first and last days named and **throughout the intervening period**. The language is neither uncertain nor open to the objection that it implies that more than one continuous offense was committed."

* If the "second" day is not named or described so as to be capable of ascertainment with certainty the *continuando* may be deemed defective as an allegation of continuity but the indictment will not be thereby vitiated.

In *State v. Lesh* (*supra*) the Court said:

"In the case of *State v. Brown*, 14 N. D. 529, 104 N. W. 1112, we upheld an information which charged that the offense (of maintaining a liquor nuisance) was committed on the 1st day of January, 1914, 'and on divers and sundry days and times between that day and the 24th day of April, A. D. 1905, and on the 24th day of April, A. D. 1905.' This allegation, we said, was 'equivalent to a statement that the nuisance was maintained on the first and last days named **and throughout the intervening period.**' We also held that it was neither uncertain nor open to the objection that it implied that more than one continuous offense was committed."

Such phrases as "the day of the finding of this indictment" or "the day of the taking of this inquisition," and the like, are considered to lay the time of continuity with *certainty* when the date is ascertainable either from the endorsements on the indictment or from the general caption or from the minutes or other records of the Court.

Comm. v. Wood, 4 Gray 11, 15.

Comm. v. Snow, 14 Gray 20.

Comm. v. Langley, 14 Gray 21.

Comm. v. Kingman, 14 Gray 85, 86.

Comm. v. Tower, 8 Met. 527.

Comm. v. Dunn, 111 Mass. 426.

Cf. *Richardson v. Northrup*, 66 Barb. 85, 87.

Jacobs v. Comm., 5 Serg. & R. 315, 316.

State v. Paine, 1 Ind. 163.

In *Comm. v. Dunn* (*supra*) the indictment was for keeping and maintaining a tenement for the illegal sale and keeping of intoxicating liquors. It alleged that the defendant

"on the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-two, and on divers other days and times between that day and the day of the finding of this indictment," kept and maintained a tenement for the illegal sale and illegal keeping of intoxicating liquors [p. 426].

It was objected that the indictment was bad for duplicity. The Court [Gray, J.] said [pp. 426-427]:

"It being clear (as is admitted by the learned counsel for the defendant) that this offense may be committed by keeping the tenement for the unlawful purpose for one day or for a longer time, and that this indictment duly charges such a keeping on October 28, 1872, and from that day to the day of the finding of this indictment, the necessary conclusion is that it *duly* charges the commission of the offense *during a single period*, beginning on said October 28 and ending on the day of the finding of the indictment, and is *not* bad for duplicity."

In *Comm. v. Snow* (*supra*) the Court said:

"This indictment is in proper form, and alleges the time of the commission of the offense with all that certainty which the law requires, and conforms in this respect to the approved precedents for cases of continuing offenses. The allegation 'to the day of making this presentment,' or 'the day of finding this indictment,' fixes the time by reference to that alleged in the caption, in the absence of any evidence of its having been made at a later period in fact. If the day of returning the indictment was later, and that fact appeared by indorsement thereon, the court have held that such date might be shown, where the offense was in fact committed after the first day of the term of the court. *Commonwealth v. Wood*, 4 Gray 11."

In *Comm. v. Langley* (*supra*) the indictment was for keeping and maintaining a tenement on

a day named "and on divers other days and times between that day and the day of finding this indictment." It was held that the indictment was good and alleged a continuous offense between two days certain—the day of the finding of the indictment being ascertainable by reference to the certificate of the clerk indorsed thereon. The Court said, *per* METCALF, J. [p. 22]:

"The indictment alleged the time of keeping and maintaining the nuisance with sufficient certainty, and in a form which warranted the admission of evidence of such keeping *during all the time* from the 1st of April, 1858, to the day when the indictment was found, as shown by the certificate of the clerk indorsed thereon."

In *Comm. v. Tower* (*supra*) the indictment was for being common sellers of liquor. Concerning it the Court said [pp. 527-528]:

"The objection that this indictment is bad because it avers the offense to have been committed 'on the 1st day of May last past, and on divers other days and times between that day and the day of taking this inquisition,' cannot avail. It is no objection that such continuous charge is made, and it accords with the forms adopted. Such was the case in *Commonwealth v. Pray*, 13 Pick. 359, and *Commonwealth v. Odlin*, 23 Pick. 275; and it seems well adapted to the description of the offense."

And if the exact day of the finding of the indictment or taking of the inquisition is not stated on the record, the time will be taken to be the first day of the term—a time ascertainable by reference to public law.

In *Comm. v. Wood* (*supra*) the Court said:

"But we are of opinion that, according to the uniform practice of our courts, where there is

nothing on the record showing the contrary, the time of finding the bill is to be taken to be the first day of the term of the court. Such indeed is the form of the caption to all indictments. When therefore an averment is made, that an offense was committed between a day certain and the day of finding the indictment, and there is nothing on the record showing the day when the indictment was found, it is equivalent to an averment that it was committed between the first day alleged and the day on which the term of the court commenced. Thus understood, there is no uncertainty in the allegation of time in this indictment. *Commonwealth v. Tower*, 8 Met. 527.

It is to be borne in mind, however, in this connection, that it is *always competent to resort to the record* for the purpose of fixing the exact day on which the indictment was found, whenever it becomes necessary to prove that it was found after the first day of the term. This is sometimes done in order to avoid the objection that the offense was actually committed after the finding of the bill. The actual time can be shown by the certificate of the clerk indorsed on the indictment, or other proper entry. *Commonwealth v. Stone*, 3 Gray 453."

The commencement of the term being fixed by public law can be judicially noticed (*vid. State v. Haddock*, 9 N. C. 461).

We have said that if an indictment merely alleges that the defendant committed the offense on a particular day named and "on divers other days," *but without alleging another day certain to mark the period of the continuando*, it will be taken as charging an offense on the particular day named, and the remainder of it may be rejected as surplusage (*vid. People v. Adams*, 17 Wend. 475; *Wells v. Comm.*, 12 Gray, 326, 327; *Hawkins*, Bk. 2, ch. 25, § 82). In other words, such an indictment does not contain a sufficient

continuando. To make a good *continuando*, there should be a day of beginning and a day of "ending" ascertainable with certainty—a *period of continuity* laid with certainty. Unless there is a day of "ending," the indictment will be considered to charge an offense on the particular day named, and the defective *continuando*—the mere phrase "on divers other days" (insufficient *per se*)—may be rejected as surplusage. To constitute a good *continuando*, it should be alleged that the offense was committed on divers other days *between two days certain*—the *period of continuity* should be laid with certainty.

If the language of NELSON, Ch. J., in *People v. Adams* (17 Wend. 475) be taken as holding that an allegation in an indictment that the offense was committed on a day certain and on divers other days *between that day and another day certain* is not good as a *continuando*, it is unsound and is contrary to the general well-settled and accepted rule. But the case, when carefully considered, does *not* so hold, as we shall presently show.

The point which the learned judge was considering in the *Adams* case was *solely* whether the whole indictment would be vitiated if it alleged a particular day certain and contained a defective *continuando*; and he concluded that the whole indictment would not be vitiated, but that a conviction could be had thereunder for the offense committed on the particular day laid [see Hawkins Bk. 2, ch. 25, § 82] NELSON, Ch. J., said:

"As to *time*, the count, I think, is sufficiently certain, a day being mentioned; the *continuando* may be rejected as surplusage. Sergeant Hawkins says, b. 2, ch. 25, § 82, that if an indictment charge a man with having done such a nuisance on such a day and year, &c., and on *divers other*

days, it is void only as to the facts on those days which are **uncertainly** alleged, and effectual for the nuisance on the day specified. See also 1 Chit. Cr. Law, 218, 180. Again he says, § 74, that if an indictment be uncertain as to some particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good for the residue. This is a general principle, applicable to all indictments, and indeed to every description of pleadings, upon the maxim, *utile per inutile non vitiatur*. 1 Chitty's Pl. 232. Here the *uncertain time* may be entirely rejected, and the indictment is still good; the offense charged being laid under a particular day" [pp. 476-477].*

It is true that in the particular case before him, it happened that the day of ending—and hence the period of continuity—was *certainly* alleged. But his discussion of the subject (which was wholly *obiter*, as the conviction was sustained) is entirely abstract—for it was directed not to the language of the indictment before him, but wholly to the case of an indictment which contained an allegation of a day certain coupled *merely* with the further allegation "on divers other days." If the indictment ended there with respect to its allegations of time, it would not contain a good *continuando*—because it would not allege with certainty a day of "ending" and would thus fail to allege with certainty a period of continuity.

It will be noticed that NELSON, Ch. J., emphasized the words "and on divers other days," but his opinion *omits* altogether any reference to the phrase "between that day and the day of the finding of the indictment." Such an allegation is very important—because in determining the validity of the *continuando* and the sufficiency of

* Italics in original.

the allegations with respect to continuity, a most important consideration is whether the *period of continuity* is laid with certainty. The *obiter* remarks of the learned judge indicate plainly that he was led into abstraction and that his discussion was directed to ascertaining what would be the result in the event that an indictment contained an allegation of a day certain followed *only* by the expression "on divers other days"—a *per se* defective *continuando*. It is *to such a case* that his whole discussion is directed. He concluded, and rightly so, that that would not be a good *continuando*; that nevertheless a conviction for an offense committed on the particular day named would be good. But—his opinion does *not* hold that an allegation in an indictment that the crime was committed on a particular day named and on divers other days *between that day and another day certain* would be bad. He did not discuss *that* proposition at all; and all the case *holds* is that a defective *continuando* will not vitiate the whole indictment.

The cases are numerous which hold that an indictment which alleges that the defendant committed the offense on a day named and on divers other days and times *between said day and another day named or described with or ascertainable with certainty*, charges but one offense—of a continuous nature committed during the specified period of time; and there is nothing in the *Adams* case, rightly considered, which conflicts with that proposition.

The caption to the present indictment shows the inquisition was taken

"IN THE ATLANTIC COUNTY COURT OF OYER AND TERMINER, JANUARY TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND FOURTEEN."

And it is alleged in the SIXTH COUNT thereof that the defendants conspired

“ON OR ABOUT THE FIRST DAY OF JANUARY, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND THIRTEEN, AND ON DIVERS OTHER DAYS BETWEEN THAT DAY AND THE DAY OF THE TAKING OF THIS INQUISITION.”

This, viewed in the light of the authorities to which we have referred, must be taken as laying with *certainly* the *period of continuity*, and as charging an offense *continuing* during that period.

Moreover, it should be borne in mind that in the present proceeding, we are not concerned with the technical sufficiency of the indictment as a pleading. The fact remains that it lays the time of the commission of the crime—the PERIOD OF CONTINUITY of the conspiracy—with definiteness. And the accused was within the State of New Jersey during that period—and under circumstances that did *not* negative the possibility—or, as Governor [afterwards Mr. Justice] Hughes puts it, “establish the impossibility” of his participation in the conspiracy. The point in this case is not whether he, in fact, participated in the conspiracy (for that is a question which goes to his guilt or innocence), but simply whether he was in the State of New Jersey during the period when the conspiracy was in existence and in operation.

And we shall now proceed to the second proposition and shall demonstrate that the crime of CONSPIRACY is a *continuous* crime and that it does *not* consist of, “a cinematographic series of distinct conspiracies, rather than a single one.”

2. "Conspiracy" a truly continuous offense.

There was at one time some doubt as to whether conspiracy was a continuous offense, and the authorities upon the question were in conflict. Those authorities which asserted the negative of the proposition based their conclusion upon the premise that a conspiracy was a wholly completed crime as soon as the unlawful agreement was made—that the agreement was the crime. The fallacy in this was exposed and the doubt as to whether a conspiracy can have continuance in time set at rest by the decisions of this court in *United States v. Kissel* (218 U. S. 601) and *Hyde v. United States* (225 U. S. 347).

In the *Kissel* case (*supra*) Mr. JUSTICE HOLMES pointed out that "it is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it"; that "when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one"; that "a conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. *A conspiracy is a partnership in criminal purposes.* That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all

without any new agreement specifically directed to that act."

Referring to this illuminating opinion, COCHRAN, D. J., said, in *Patterson v. United States* (222 Fed. Rep. 599, 630):

"Before the decision in that case the question of the continuance of a conspiracy was in confusion and the authorities in conflict. There is no longer any confusion. The position there combated was that a conspiracy could not have continuance in time. It was urged that it could not, because it consisted in an unlawful agreement, and an agreement does not have continuance. That that was what it consisted in seemed to be justified by the common definition of a conspiracy as an agreement to do an unlawful thing, or to do a lawful thing by unlawful means. But this is no longer an accurate definition of a conspiracy. The agreement simply initiates the conspiracy, but it is not the whole of it."

After quoting from the opinion of MR. JUSTICE HOLMES, *supra*, he continued:

"Here we have an accurate definition of a conspiracy. It is 'a partnership in criminal purposes,' to which we might add, brought about by an agreement. So long, then as the partnership in a criminal purpose continues, the conspiracy continues. And it may continue without anything being done in furtherance of it. * * * It may be important to show something done in furtherance of the conspiracy within the period to establish its continuance into it. It is not essential to its continuance thereinto."

The doctrine of the *Kissel* case was reasserted by MR. JUSTICE MCKENNA in the *Hyde* case (*supra*) where he pointed out that "men may have lawful and unlawful purposes, temporary or enduring"—that the distinction was vital and had different consequences and incidents, that a con-

spiracy "accomplished or having a distinct period of accomplishment" was different from one that was to be continuous. The learned justice laid emphasis upon the proposition that if the conspiracy is continuous the relation of the conspirators to it remains throughout the period of continuity as it was in the beginning, and that each conspirator *continues to incur the guilt of the conspiracy without intermission* until, by some affirmative action, he withdraws himself from the execution of its purposes. He said:

"If it may continue it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time he remains an agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of law. As the offense has not been terminated or accomplished he is still offending. And we think **consciously offending**, offending as certainly, as we have said, as at the first moment of his confederation, and **consciously through every moment of its existence**. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the *Kissel* Case stated in another way. As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he

does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied."

That a conspiracy may have continuity in time was reasserted in *Brown v. Elliott*, 225 U. S. 392, 400; and the principle has been frequently applied—*Ryan v. United States*, 216 Fed. Rep. 13, 33; *Houston v. United States*, 217 Fed. Rep. 852, 859; *Meyer v. United States*, 220 Fed. Rep. 800; *McKelvey v. United States*, 241 Fed. Rep. 801, generally in cases where, by reason of the non-performance of an overt act by a particular defendant within the period of limitation he has sought to plead in bar the statute of limitations—and always unsuccessfully.

While it is, in many jurisdictions, provided by statute that certain conspiracies are not punishable unless an overt act was done in pursuance of the agreement, it remains true, nevertheless, that "in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof" (*Green v. Davies*, 182 N. Y. 499, 503). The "*gravamen* of the offense is the conspiracy," but an overt act is necessary to complete the offense (*Hyde v. Shine*, 199 U. S. 62, 76; *Brown v. Elliott*, 225 U. S. 392, 401). The overt act need not be of itself a criminal act nor constitute the very crime that is the object of the conspiracy; and it is not necessary that each conspirator should join in the overt act in order to incur the guilt of the conspiracy (*United States v. Rabinowich*, 238 U. S. 78, 86). When an "act to effect" the object of the conspiracy is done by one, the liability attaches to all who were parties to the agreement (*Hyde v. United States*,

225 U. S. 347, 359) and each continues to incur guilt until he ceases to be a partner in the enterprise.—Parties who come into a conspiracy subsequent to its formation and adopt it in its design and purpose are bound by what has been done before their entry (*People v. Mather*, 4 Wend. 229, 261, 262; *Comm. v. Rogers*, 181 Mass. 184).

The fact that a particular co-conspirator, who had not withdrawn from the execution of the purpose, did not commit or participate in an overt act of the conspiracy within the period of limitation will not afford him a basis to plead the statute of limitations in bar of a prosecution strongly illustrates that so long as he, even though inactive, remains a party to the conspiracy, he “incurs the guilt” thereof *continuously* and is, all the time, offending, and “consciously offending,” “through every moment of its existence.”

Hyde v. United States, 225 U. S. 347.

United States v. Kissel, 218 U. S. 601.

These and many other cases support the proposition that so long as the corrupt agreement is in operation—so long as the partnership resulting from it is in existence—the offense is a continuing one—and that it continues constantly as to each party to the agreement until, by affirmative action, he withdraws from its execution.—And though the crime to commit which it was formed may have been consummated, it continues while the parties are dividing its fruits according to their plan (*People v. Storrs*, 207 N. Y. 147, 157, 159).

It is occasionally said, where the conspiracy contemplates various overt acts and the consequent commission of a course of conduct beyond

the commission of the first act, that each overt act thereafter constitutes a "renewal" or continuance of the agreement (*Hedderly v. United States*, 193 Fed. Rep. 561, 569). But, in truth, these overt acts, which are said to constitute renewals, are manifestations of the continued—the unceasing—existence of the conspiracy; they are the outward signs of the existing condition, and disclose its still continuing existence and non-abandonment. So long as the conspiracy contemplates future action, the crime is continuing—and in the course of commission. The conspiracy only ceases to exist when the purpose is completely effected or when it is wholly abandoned.

Warren v. United States, 199 Fed. Rep. 753, 756.

Breese v. United States, 203 Fed. Rep. 824.

Wilson v. United States, 190 Fed. Rep. 427, 435-436.

Kissel v. United States, 218 U. S. 601.

Hyde v. United States, 225 U. S. 347.

The overt acts committed from time to time do not constitute the offense; they are the *manifestation* of its existence, its non-abandonment, its continuity.

United States v. Brace, 149 Fed. Rep. 874.

United States v. Raley, 173 Fed. Rep. 159.

Jones v. United States, 162 Fed. Rep. 417, 427.

United States v. Bradford, 148 Fed. Rep. 413, 418-419.

Ware v. United States, 154 Fed. Rep. 877.

United States v. Barber, 157 Fed. Rep. 889.

United States v. Greene, 115 Fed. Rep. 343, 349-350.

United States v. Stern, 186 Fed. Rep. 854-855.

Ochs v. People, 124 Ill. 399.

People v. Mather, 4 Wend. 230, 259.

People v. Willis, 23 Misc. 568, 573.

Like treason in England consisting of imagining the death of the king, the crime "is committed wherever the traitor is." He furnishes proof of his wicked intention by the exhibition of any overt act. So it is with conspiracy. And an act done by any one of the conspirators furnishes proof of the continuance of the conspiracy as to all—indicates its non-abandonment (*People v. Mather*, 4 Wend. [N. Y.] 230, 259; *Hyde v. United States*, 225 U. S. 347, 366).

Two cases very much in point as indicating that the conspiracy charged in the present indictment (Count 6) was a continuing one are *Breese v. United States* (203 Fed. Rep. 824) and *Wilson v. United States* (190 Fed. Rep. 427).

In the *Breese* case the indictment was for conspiracy to EMBEZZLE, ABSTRACT AND MISAPPLY FUNDS AND CREDITS OF A NATIONAL BANK. It was held that such a conspiracy was a continuing offense, that it continued until its purpose had been fully effected, or until it was abandoned, that, so long as the purpose remained and was not affirmatively abandoned, the conspiracy continued in existence, and the crime in course of commission, the court saying, "a conspiracy such as is charged here continues until its purpose has been fully effected, or until it has been abandoned."

To like effect is the case of *Meyer v. United States* (220 Fed. Rep. 800) where the conspiracy was to defraud the United States Government by selling zinc to it at an exorbitant price.

In the *Wilson* case the indictment charged a conspiracy to make a fraudulent use of the mails. The scheme was to obtain money by false and fraudulent pretenses and representations and involved the SELLING OF WORTHLESS MINING STOCK. The application of the statute of limitations to the conspiracy count of the indictment depended upon whether it was *continuous*. The Court [Noyes, C. J.] said [pp. 435-436]:

"In our opinion the averments of the indictment with respect to the nature of the conspiracy as well as the proof itself show that it was necessarily a continuous one. In the language of Mr. JUSTICE HOLMES in the *Kissel* Case, 'A conspiracy is a partnership in criminal purposes.' Such a complex and far-reaching partnership as that described in the indictment requires continuance of operation to accomplish its object and continues until such purposes are accomplished or the partnership abandoned.

We are unable to appreciate the distinction between a conspiracy to close a factory so that it will not be a competitor of the conspirators—as in the *Kissel* Case—and a conspiracy *to dispose of a large amount of stock to whomever may be induced to buy*, which necessarily contemplates a continuance of selling until the amount of stock controlled by the conspirators *shall be sold*. If in the one case the conspiracy continues 'fresh every day' until the factory is permitted to open, it seems clear, in the other case that it continues *until the conspirators cease disposing of the stock or give up the scheme*.

It is also urged that the *Kissel* decision is inapplicable because the present indictment does not contain in express terms a *continuando*. As just pointed out, we think that the averments

of the indictment with respect to the nature of the conspiracy necessarily involved the allegation that the conspiracy was a continuous one and were equivalent to an express allegation that it had continuance in time."

In the CASE AT BAR, the indictment charges a GENERAL CONSPIRACY TO DEFRAUD BY THE PUTTING OUT OF WORTHLESS CHECKS AND LETTERS OF CREDIT (Count 6, Record, 96-98). The scheme was to obtain money by false and fraudulent representations and by means of worthless checks and letters of credit from everybody whom the conspirators could defraud. It was a "generic" conspiracy to swindle whomever might be induced to accept the worthless checks, and it was contemplated that it should continue until the conspirators ceased putting out such checks and letters of credit or gave up the scheme. It was more conspicuously continuous in its nature than was the conspiracy involved in the *Wilson* case or the *Breese* case to which we have above referred.

A conspiracy may be formed to cheat and defraud a particular person, or it may embrace in its scope and purposes a general scheme of fraud. In other words, it may be a specific conspiracy or a generic conspiracy (*Comm. v. Harley*, 7 Met. [48 Mass.] 506, 509; *Patterson v. United States*, 222 Fed. Rep. 599, 630). The conspiracy charged in the sixth count of the present indictment is, as we have said, a *generic* one; and while this would not be a necessary factor in determining whether or not a particular conspiracy was a *continuing* one—for even a specific conspiracy may be continuous—its generic character might well illuminate and bring into prominence the feature of continuity and, so long as the scheme remained in existence, the continuing guilt-incurring *status*

of all who were parties to it and had not withdrawn from the execution of its purposes.

Now coming to apply this to the present case, and, for the moment, bringing into the foreground the *res* of the conspiracy, we see that it goes on uninterruptedly. It does not die and come to life again with each overt act. Its life goes on from its birth to its final dissolution. To use another simile, it is like an underground river, flowing continuously on until it is exhausted. The overt acts committed from time to time are the surface indications of its continuance—the outward and visible signs of its existence. These may take place from day to day or at intervals, and are in truth but *evidential* of the existence of the conspiracy or design. The conspiracy is not a series of intermittent acts or a series of intermittent or independent crimes. As MR. JUSTICE HOLMES has said: “It is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies rather than to call it a single one” (*United States v. Kissel*, 218 U. S. 601, 608). It is the unlawful confederacy or partnership that is the gist of the offense; and that continues. The *res* is ever there.

Or, viewing it in another perspective which brings into the foreground the *personae* of the conspiracy, we perceive that to each of them attaches a *status* by reason of which there is a constant and continual incurrance of guilt, wherever he may be—throughout the period over which the conspiracy extends; and this without individual action on his part. It is, like marriage, for example, a *status* which remains constant until the *status* is dissolved (*Hyde v. United*

States, supra). Each conspirator is a conspirator and, notwithstanding non-action by him, offending as such and "consciously offending" throughout the period of the conspiracy and "through every moment of its existence" (*Hyde v. United States, supra*). Though he might be seemingly passive, he is yet offending.

Thus, it follows that when the prisoner in the case at bar was in the State of New Jersey on three separate occasions during the period of continuity of the conspiracy charged—and especially since his presence there was not under circumstances which establish the impossibility of his participation in the crime * (*Matter of Hoffstot, supra*)—he was *then and there* offending, "consciously offending" as a conspirator and *incurring guilt* as such (*vid. Strassheim v. Daily*, 221 U. S. 280, 285). The conspiracy was going on there, was being there committed; and *by him*—whether he committed an overt act or not. Consequently, by his departure from that State, he having incurred guilt there and having been there while the crime was in course of commission, he became a fugitive from justice. Such is the inevitable result of the application to this case of the doctrines of law laid down in the *Hoffstot* and *Meeker* cases (*supra*) considered in conjunction with those laid down in the *Kissel* and *Hyde* cases.

It is immaterial what his motives were in going to or leaving the State of New Jersey, or that, in leaving, he was returning to his home in New York (*Biddinger v. Police Commr.*, 245 U. S. 128, 133; *Appleyard v. Mass.*, 203 U. S. 222, 232; *Kingsbury's Case*, 106 Mass. 223, 227, 228). The question whether he actually incurred guilt

* This qualification is, we submit, unnecessary.

or was, in fact, a party to the conspiracy in New Jersey is one which goes to his guilt or innocence—a question which is wholly outside the scope of the inquiry in this proceeding. The prisoner was in the State of New Jersey when the crime of which he is *accused* was, in part, committed—when it was in course of commission. He was physically present in the demanding state *at the time of the commission of the alleged crime*. Hence, he is a fugitive from justice within the meaning of the Constitution and the Act of Congress—which required compliance with the demand for his surrender.

We believe that we have demonstrated beyond question that the indictment in this case, even if it be critically examined with respect to its technical sufficiency as a pleading, is definite in its allegations of “time” and “continuity” and sets forth with *certainty* the period of time during which the conspiracy was continuously in existence and operation.

We have done more than required in that respect; for it has been laid down over and over again that in an extradition proceeding, the technical sufficiency of an indictment as a pleading will *not* be examined. The indictment will only be examined to the extent of ascertaining whether it substantially charges a crime—whether its allegations are good in substance. Its technical accuracy as a pleading will be left to the tribunals of the demanding state in which it was found and is pending.*

* Where the extradition is sought on *affidavits* they will be more critically examined, as the accusation is then that of an *ex parte* individual accuser (*People ex rel. Himmelstein v. Baker*, 137 App. Div. 824, 825; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, 188, 190, 191; Seward's Works, Vol. II, p. 528; *Davis's case*, 122 Mass. 324, 329-330). In the *Lawrence* case

- Pierce v. Creecy*, 210 U. S. 387, 404-405.
Ex parte Pearce, 32 Tex. App. 301, 307;
 aff'd. as *Pearce v. Texas*, 155 U. S.
 311.
Drew v. Thaw, 235 U. S. 432, 439.
People ex rel. Hamilton v. Police Com-
missioner, 100 App. Div. 483.
People ex rel. Himmelstein v. Baker,
 137 App. Div. 823, 825.
In re Roberts, 24 Fed. Rep. 132, 133,
 134; aff'd. as *Roberts v. Reilly*, 116
 U. S. 80, 95, 96.
Davis's Case, 122 Mass. 324, 329.
In re Greenough, 31 Vt. 279, 288.
State v. Clough, 71 N. H. 594, 602; aff'd.
 as *Munsey v. Clough*, 196 U. S. 364.
State v. O'Connor, 38 Minn. 243.
In re Voorhees, 32 N. J. L. 141.
Ex parte Swearingen, 13 S. C. 74, 78.
Leary's Case, 6 Abb. N. C. 43, 64.
Reed v. United States, 224 Fed. Rep.
 378, 381.

In *Pierce v. Creecy* (*supra*) the Court said [p. 405] that

"If more were required it would impose upon courts, in the trial of writs of *habeas corpus*, the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decisions, irritable to the just pride of the states and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance."

(56 N. Y. 182) there was *no indictment*. The appellant's counsel was in error below in assuming that there was.

The Court further said that objections to an indictment which were apt only to destroy its validity as a criminal pleading would be of no avail, saying [pp. 401-402]:

"There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending. We are unable to adopt the test suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different states, there is nothing in principle or authority which supports it. * * * The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled."

In short, as stated by LAUGHLIN, J., in *People ex rel. Hamilton v. Police Commr.* (*supra*), "before the court in the jurisdiction granting the warrant will be justified in holding an indictment bad, an extreme case would be required, and one wherein no other rational conclusion could be reached."

It has been held that even though it appears upon the face of the indictment that the period of limitation against the prosecution had run, its validity as a basis for extradition will not be affected. The statute of limitations may be invoked by way of defense (or possibly by demurrer) in the tribunals of the state in which the indictment was found.

Pierce v. Creecy, 210 U. S. 387, 403.

State ex rel. Munsey v. Clough, 71 N. H.

594; aff'd. as *Munsey v. Clough*, 196 U. S. 364.

And even if the defendant had remained in the demanding state for a period outrunning the statute of limitations and then departed therefrom, he would be none the less a "fugitive from justice" within the meaning of the law of interstate rendition.

Biddinger v. Police Commissioner, 245 U. S. 128.

The same rule—that the technical accuracy of the indictment will not be inquired into—applies with equal force to the allegations of *continuity* in charging a continuous offense. The true test to be applied is whether the period of continuity has been laid with substantial definiteness—not whether it has been pleaded with the most precise technical accuracy.

It must be borne in mind also that we are not now concerned at all with the question whether the defendant actually participated in the conspiracy, or whether he *committed* any of the acts thereof. "The question is never whether the prisoner is guilty or innocent, whether a crime has been committed or not. Those are later questions as to which the party arrested, in due season, will have full opportunity to be heard." (*People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, 443.) "Care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt." (*Matter of Strauss*, 197 U. S. 324, 333.)

Whether regard be had to the specific dates laid in the indictment or to the *continuando*, the prisoner was a "fugitive from justice" within the meaning of the Constitution and the Act of Congress, and the State of New York was *bound* thereby to surrender him.

POINT II.

A State has the right, by virtue of its reserved sovereign power, to surrender an accused person to another State of the Union for trial there, even though, by the Federal Constitution and Laws, no obligation so to do is, in the specific case, imposed upon it.

We have heretofore discussed this case on the assumption that the power of a State as respects rendition was commensurate with its constitutional obligation; and we now propose to contend that a State may, in the exercise of its reserved sovereign power, surrender an accused person to another State for trial there, notwithstanding that by the provision of the Constitution and the Act of Congress it is not, in the particular instance, *required* so to do—that the Constitution merely *obliges* the States to do in some cases what, by virtue of their inherent—reserved—power, they may do in any case.

Doubtless, the theory of our Government which vests the conduct of all foreign relations and intercourse in the National Government, would exclude the power of a State to deliver a fugitive to a *foreign* nation. Although that

question has been the subject of controversy (*Holmes v. Jennison*, 14 Pet. 540) and has never been actually decided by this Court, the generally accepted view, adhered to in practice and finding cogent sanction in the opinion of learned jurists, is that such a power does not exist (*United States v. Rauscher*, 119 U. S. 407, 412-414; *Holmes v. Jennison*, 14 Pet. 540 [Taney, C. J.]; Moore Int. Dig., Vol. IV, § 579; Moore on Extradition, Vol. I, § 58, Vol. II, § 536); and we shall assume, therefore, that, owing to the *international* nature of the subject, a State has no power to surrender a fugitive criminal to a *foreign* nation. International affairs come with the powers of the Federal Government as to which its action is exclusive, there being an implied surrender by the States of their powers in such matters.

But the power of a State to surrender an accused person to ANOTHER STATE OF THE UNION presents a different question; and it is to that question that we shall now direct our consideration, craving the Court's indulgence if we discuss it at some length.

The question has never, so far as we are aware, been decided by *this* Court.

In *Hyatt v. Corkran* (188 U. S. 691), the situation before THIS COURT was that Tennessee, the demanding State, was asserting a right under the Federal Constitution to have its demand for the surrender of Corkran complied with, taking the position that a "constructive presence" of the accused in the demanding State would suffice to constitute him a fugitive from justice, within the meaning of the Constitution and the Act of Congress, and thus require the State of New York to comply with its demand for his surren-

der—suffice to impose the constitutional *obligation*. The case, as it came to this court, did *not* bring up for decision the *power* of the State of New York to surrender Corkran. It brought up merely the question of the right of the State of Tennessee to *insist* that *its demand* for the surrender be *complied with*—or, to state it in another form, the right of the State of New York, in the particular instance, to refuse rendition—the State of New York, by its governmental agencies, having refused a surrender of the alleged fugitive.*

In proceeding with the further consideration of this subject, it seems fitting (1) to establish certain general principles, and (2), in the light of these principles, to examine critically the provision of the Federal Constitution relating to fugitives from justice—at the same time (3) pointing out the fallacies in the opinions which deny the existence of the power for which we contend, (4) collating the authorities which directly support our position, and (5) showing that it is not only in harmony with the Constitution, but based upon the soundest considerations of public policy.

When Congress legislates on a given subject, the effect upon State legislation will vary according to the nature of the subject and the action taken by Congress with respect thereof. Thus:

As respects a delegated power.—When Congress acts so as to bring within National control a subject over which there has been granted to it the power of direct and general control, and clearly manifests its purpose to call into play its exclusive power, State law is superseded and

* The New York Court of Appeals, reviewing the Governor's action, had ordered the prisoner's discharge (172 N. Y. 176).

excluded—even though it be coincident with or complementary to the Federal legislation.

Gibbons v. Ogden, 9 Wheat 1, 209.

Lake Shore & Mich. South. Railway v. Ohio, 173 U. S. 285, 297, 298.

Reid v. Colorado, 187 U. S. 137, 147.

Charlestown & Car. R. R. v. Varnville, 237 U. S. 597, 604.

Erie R. R. Co. v. New York, 233 U. S. 671, 681, 682, 683.

N. Y. C. R. R. Co. v. Winfield, 244 U. S. 147, 148.

The middle ground.—As to those matters in respect of which no direct and general power of control is granted to Congress, and, consequently, as to which, looking to the object to be accomplished, there may be a concurrent exercise of power by Congress and by the State, the Federal law, made pursuant to the Constitution, and in the discharge of a constitutional function devolved upon Congress, will, so far as it operates, be paramount and controlling; and a State law, to the extent to which it *conflicts* with the Federal law, must give way. As Congress proceeds in the legitimate exercise of its constitutional functions, State laws will correspondingly recede or give way—in order that *conflict* may be avoided and the paramount law control.

Gibbons v. Ogden, 9 Wheat 1, 203-204.

New York v. Miln, 11 Pet. 102, 137.

Keller v. United States, 213 U. S. 138, 145-146.

Minnesota Rate Cases, 230 U. S. 352, 402 *et seq.*, 411, 412.

South Carolina v. United States, 199 U. S. 437, 448 *et seq.*

McCray v. United States, 195 U. S. 27, 60.

Compagnie Francaise & Co. v. Board of Health, 186 U. S. 380, 388 *et seq.* 397.
Smith v. Alabama, 124 U. S. 465, 480-482.

Sligh v. Kirkwood, 237 U. S. 52.

Innes v. Tobin, 240 U. S. 137, 132-134.

The reserved powers.—The Federal Constitution and the laws passed in pursuance thereof and in conformity therewith are the supreme law of the land. That we take to be axiomatic. Except in so far as their sovereign powers have been, by the Constitution, surrendered to the general government or prohibited, either expressly or by *necessary* implication, to the States, the power of the State is supreme; and Congress, except in so far as it is necessary to carry out a constitutional function devolved upon it, is as powerless to interfere with State legislation or action as a State is to interfere with or supplement, as the case may be, Congressional action done in the performance of its constitutional functions.

U. S. Const., Amdt. X.

Ware v. Hylton, 3 Dall. 199, 224.

New York v. Miln, 11 Pet. 102, 139.

Trade-Mark Cases, 100 U. S. 82.

Presser v. Illinois, 116 U. S. 252, 268.

Employers' Liability Cases, 207 U. S. 463, 502.

Keller v. United States, 213 U. S. 138, 144-147.

House v. Mayes, 219 U. S. 270, 281-282.

Proceeding, then, in the light of these principles, to a critical examination of the provision of the Federal Constitution relating to fugitives from justice: It will be noticed, first, that it does

not contain a grant or delegation of power to Congress or to the Federal government. No power of direct and general control over the subject is conferred on Congress. Interstate rendition is not a delegated power. We shall, however, postpone consideration of that specific phase of the subject until later. Then, it will be noticed that its words are words of command—not of prohibition. Nothing in its language suggests the idea of prohibition. A positive duty is imposed. Nothing suggests a limitation of power—except that, by necessary intendment, there is taken away the *right to refuse* to do that which the Constitution commands shall be done.*

This becomes doubly clear when we compare the provision with other provisions of the Constitution which concern the States. Thus, taking, for example, Art. I, § 10, it is there provided that "*No State shall*" enter into any treaty, alliance or confederation; grant letters of marque and reprisal; pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, etc. Here are words of express prohibition. The States are *forbidden* to do those things.—Those powers are "*prohibited*" by the Constitution "to the States" [*vid* U. S. Const. Amd't. X]. Then, passing to Art. IV, we find that it provides:

"§ 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

"§ 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

* The exclusion of a discretion to refuse is not a limitation of the positive exercise of a power to act.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

These are positive words of command—not negative words of prohibition. They impose a duty—an obligation. They do not prohibit the exercise of a power. They command its exercise.

And by the Act of Congress [Act of Feb. 12, 1793—U. S. Rev. Stat. § 5278]—which was enacted to provide a procedural mode of executing the constitutional provision (*Kentucky v. Dennison*, 25 How. 66, 104; *Lascelles v. Georgia*, 148 U. S. 537, 540)—it is declared that whenever the executive authority of the State from which the accused has fled, demands his surrender "*it shall be the duty of the executive authority*" of the State to which he has fled to cause him to be arrested, secured and delivered. This, too, is the imposition of a duty—not the limitation of a power. It is a command to exercise a power.

It is true that, so far as the Constitutional provision and the Act of Congress regulate the subject to which they relate, they are controlling, and exclude all State action which would conflict with them or impair their efficacy (*Prigg v. Pennsylvania*, 16 Pet. 539; *Innes v. Tobin*, 240 U. S. 127, 131-134). A State cannot, by any of its agencies, act in such a manner as would obstruct, come in *conflict* with, destroy or impair these provisions (*Prigg v. Pennsylvania*, *supra*; *Innes v. Tobin*, *supra*). It cannot rid itself of the duty—the obligation. But that is a totally different proposition from the right and power of a State to go *beyond* the *obligation* to surrender

fugitives imposed upon it by the Constitution, and to do more than the Constitution *requires* it to do. By doing more than it is required to do, the State is not acting in a manner *repugnant* to the Constitution; its action is not *in conflict* therewith—for there is nothing in the Constitution which, either expressly or by implication, forbids it, as we shall hereafter more fully show.

The duty of devising a mode of carrying the constitutional provision into execution devolved upon Congress (*Kentucky v. Dennison*, 24 How. 66, 104-105). That was the constitutional function it was called upon to discharge—and the scope and extent thereof. It was not exercising a delegated power in relation to a subject over which it was granted direct and complete control. Hence, State legislation or action is not excluded—except to the extent that it would impair or conflict with the discharge of the constitutional functions of Congress. An obligation to surrender was imposed upon the State by the Constitution. The function of Congress was to make provision for the due performance of that obligation. But a power to surrender exists in the State by virtue of its inherent sovereignty. And if that power was not taken away or limited (and that it was not we shall hereafter show, and shall for the moment assume) the State might devise modes of executing *that* power—not inconsistent with the Constitution or with the Act of Congress passed in the performance of *its* constitutional function. As stated by CHIEF JUSTICE MARSHALL in *Gibbons v. Ogden* (9 Wheat 1, 203-204), after pointing out that as respects subjects over which a power of direct and general control was not granted to Congress, State legislation or action was not excluded:

“So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct, to establish their individuality.”*

Even if the imposition of a duty were to be taken as carrying with it a *grant* of *power* to perform it, that power must not be confused with an existing power of a similar nature. The powers remain distinct, even though the modes of execution of each might be almost identical.*

The history of the Constitutional provision shows that it was adopted to make obligatory, in the cases to which it relates—*i. e.*, where there was an *actual* “fleeing from justice”—the surrender of accused persons to the States whose laws they had violated and from which they had departed before they could be apprehended. What had theretofore been done by voluntary action, or as a matter of comity, both as between the Colonies and under the Confederation, became an *obligation*; and to make it such was the purpose of the Constitutional provision. So far from limiting the power of the States to *surrender* fugitives, it provided for surrender—for the exercise of the power—contrary to their will—in the cases to which it related.

* See *New York v. Miln*, 11 Pet. 102, 137; *Keller v. United States*, 213 U. S. 138, 146.

Moore on Extradition, Vol. II, §§ 516, 517, 607.

Farrand, Records of Fed. Convention, Vol. III, 112.

Kentucky v. Dennison, 24 How. 65.

State v. Buzine, 4 Harr. [Del.] 572, 574.

Matter of Fetter, 23 N. J. L. 311, 315.

Holmes v. Jennison, 14 Pet. 540 [Opin. of Mr. Justice Catron].

Lascelles v. Georgia, 148 U. S. 537, 541, 542.

Biddinger v. Police Commissioner, 245 U. S. 128, 132-133.

MR. JOHN BASSETT MOORE SAYS [§ 517]:

"The provision in the Constitution for the rendition of fugitives from justice involved no new principle. It merely prescribed the method of doing what up to and even after the adoption of the Articles of Confederation of 1778 was usually accomplished through the courts, without the intervention of the executive. The evidences of this fact are abundant and conclusive."

The provision of the Constitution relating to the surrender of fugitives was derived from a provision which, in substantially similar terms, had been included in the Articles of Confederation. Under the Articles of Confederation, surrender was an act of comity. In the Constitution, it became, in the cases provided for, a duty—an *obligation*. As stated by CHARLES PINCKNEY, the provisions were alike "except with this difference, that the *demand* of the Executive of a State *shall be complied with*."*

Farrand, Records of the Federal Convention, Vol. III, p. 112.

* Italics ours.

Mr. MOORE further says [§ 607]:

"In his very lucid and forcible decision in the case of *State v. Bazine* [*supra*], Chief Justice Booth said that the right to recover fugitive criminals as between the States of the Union was not derived from the Constitution, 'but existed independently of it;' and he added that the constitutional provision was adopted 'to make the arrest and surrender of the criminal, on demand of the executive authority of the State from which he fled, an imperative duty; and not to depend on the discretionary exercise of a right or power.' "

The statesmen who framed the Constitution were fully sensible of the complex governmental structure with which they were dealing—a Federal Union of independent *sovereign* States, binding themselves together for specific national purposes, and for mutual aid, each to the other, in the enforcement of their laws, but each retaining all the powers of sovereignty not delegated to the general government and all the powers the exercise of which was not, expressly or by necessary implication, prohibited by the Constitution—a proposition on which the States insisted and respecting which they demanded an explicit declaration (U. S. Const., Amd't. X). Except as their sovereignty was surrendered, qualified or limited by the Constitution and the laws passed in pursuance thereof, the States retained *all* the attributes of sovereignty (*New York v. Miln*, 11 Pet. 102, 139; *Chisholm v. Georgia*, 2 Dall. 419, 435; *Presser v. Illinois*, 116 U. S. 252, 265, 268; *Mahon v. Justice*, 127 U. S. 700, 704-705).

The form which the provision respecting fugitives from justice took gave direct recognition to State sovereignty. It recognized the general principle of international law that no *obligation* rested upon a sovereign state to sur-

render fugitives (*vid. United States v. Rauscher*, 119 U. S. 407, 411-412); and, hence, so far as the *obligation* was concerned, positive law was necessary to impose it. Between separate nations it would be imposed by a treaty. As between the States of the Union, it was imposed by the compact of the Constitution. The Constitution, the supreme law of the land, imposed it with compelling force (*Lascelles v. Georgia*, 148 U. S. 537, 545-546; *Kentucky v. Dennison*, 24 How. 66, 100). But the Constitution did not cut off the *power* of a State to surrender an accused person to another State, even though it did not in all instances *require* it to do so. It excluded, in the cases provided for, the *right* to *refuse* surrender; it did not limit the *power to surrender*.—THE IMPOSITION OF A DUTY, AND THE CONSEQUENT DENIAL OF DISCRETION WITH RESPECT TO ITS PERFORMANCE, MUST NOT BE MISTAKEN FOR A LIMITATION OF THE EXERCISE OF A POWER. It is the failure to appreciate this distinction that constitutes one of the fundamental fallacies in the arguments that are opposed to our contention.

By the accepted principles of international law and comity, a sovereign state is not *obliged*, in the absence of a treaty, to surrender fugitive criminals (*United States v. Rauscher, supra*); but, though not *obliged*, it may in the exercise of its sovereign power, voluntarily surrender accused persons if it sees fit to do so (*In re Neely*, 103 Fed. Rep. 626, 628, *aff'd.* 180 U. S. 126; *In re Kaine*, 14 Fed. Cas. 84, 91, 92; *Ex parte Foss*, 102 Cal. 347, 352; *Matter of Fetter*, 23 N. J. L. 311; *Ker v. Illinois*, 119 U. S. 436, 442; *Comm. ex rel. Short v. Deacon*, 10 S. & R. 125; *Matter of Clark*, 9 Wend. 212, 218-219—*cf. Fong Yue Ting v. United States*, 149 U. S. 698); and even where there is a treaty upon the subject,

a state may, if it so choose, go *beyond* the obligations of the treaty and surrender a criminal—even though, by the treaty, it is not bound to do so (*Ex parte Foss*, 102 Cal. 347, 352). Of that there can be no question. That is a positive exercise of a sovereign power.

This power, and the right to exercise it, *as respects each other*, remained with the States of the Union. The Constitution was not designed to, and did not, interfere with it, take it away or exclude its exercise—a proposition which we shall hereafter demonstrate.

The framers of the Constitution and of the Act of Congress likewise gave recognition to the general principle that the process of a state has no force *ex proprio vigore* beyond its frontier, at which, it may be said, its sovereignty expires; and, mindful of the fact that to permit the agencies of one State to pursue a departing criminal into the territory of another and there execute their process might be irritable to the just pride of the State whose territory was thus invaded and be calculated to provoke resentment, they provided that the surrender, even when obligatory, should be effected by the executive action of the State into which the criminal had come, rather than that the process of the State whose laws had been violated should run beyond its territorial boundary; and thus, while providing against sanctuary to the departing criminal (*Lascelles v. Georgia*, 148 U. S. 537; *Biddinger v. Police Commissioner*, 245 U. S. 128, 132), they gave scrupulous observance to the amenities of the situation and the general principles of international intercourse, in the light of which the constitutional provision—a compact between the States (*Kentucky v. Denison*, 24 How. 65, 100) of irresistibly binding

force (*Lascelles v. Georgia*, 148 U. S. 537)—was obviously framed, the SOVEREIGNTY of the SURRENDERING State being brought into prominence, even as respects the performance of the obligation. The function was a State function, executed by State agencies (*Robb v. Connolly*, 111 U. S. 624, 634-635; *Kentucky v. Dennison*, *supra*). PHYSICAL PRESENCE of the accused *in the territory* of the State whose laws were violated, and consequent departure, was the prerequisite of the RIGHT TO DEMAND (and hence, to the correlative OBLIGATION to surrender, which, in order that the sovereignty of the other State might be preserved, was accorded instead of the right of pursuit and apprehension.—It was not, and is not, a logical or legal necessity to the exercise of the *power* to surrender.

Although there are expressions in the opinions of some courts to the effect that the *power* of a State to surrender a person to another State of the Union for trial on a criminal charge is derived solely from and is dependent upon the provisions of the Federal Constitution and the Act of Congress, and that these provisions—which, under certain circumstances, confer the *right to demand* and impose the correlative *obligation* to surrender (*Kentucky v. Dennison*, 24 How. 66, 103; *Lascelles v. Georgia*, 148 U. S. 537, 541)—must, by necessary implication, be deemed to prohibit a surrender except in pursuance thereto and in conformity therewith (*People ex rel Corkran v. Hyatt*, 172 N. Y. 176, 182; *People ex rel Kopel v. Bingham*, 189 N. Y. 124, 127; *In re Kopel*, 148 Fed. Rep. 505, 506), the contrary of that proposition has been specifically asserted by courts, judges and writers of high authority, who maintain that the Federal Constitution

(while rendering it *obligatory* on the States to comply with a demand to surrender persons charged with crime who, while within the territorial jurisdiction of a State, violated its criminal law and then placed themselves beyond the reach of its process by departing from its jurisdiction, and thus "fled from justice") does *not exclude*, or constitute a limitation of, the right of a State, in the exercise of its reserved sovereign power, to deliver an accused person to another State for trial there, even though, by the Federal Constitution, no *obligation* so to do is, in the specific case, imposed upon it; and that such action by the State is not repugnant, either in letter or spirit, to the Constitution or the Act of Congress. Far otherwise.

Matter of Fetter, 23 N. J. L. 311, 315, 316.

State v. Hall, 115 N. C. 811, 818, 824.

Dennison v. Christian, 72 Neb. 703, 707; aff'd. 196 U. S. 637.

Knowlton's Case, 5 Crim. Law Mag. 250, 254.

Comm. v. Wilson, 1 Phila. 80.

State v. Anderson, 1 Hill. L. R. [S. C.] 348, 349.

Holmes v. Jennison, 14 Pet. 538, 596 [Opin. of Mr. Justice Catron].

Am. Law Review, Vol. XVIII, 690.

Harvard Law Review, Vol. XXI, 224-225.

Greenbag, Vol. XIX, 636-644.

These authorities take the view—and support it with arguments of convincing strength—that the Constitution, in the cases to which it relates, provides for surrender contrary to the will of the State, and, in such cases, excludes the right

or discretion to refuse, but does not (otherwise) limit the power of the State to surrender—that that was its purpose and is its sole effect. They will be discussed more fully later. Let us first consider the opposing arguments.

Those judges who, in *dicta*, have denied the existence of this power in the States, proceed to their conclusion from one or other of three fundamental fallacies or false premises. They proceed either (1) from the proposition, as suggested by Hough, J., in *In re Kopel* (*supra*) that the surrender of a person by one State to another, in a case where it was not required by the Constitution, would be violative of the provision of the Constitution (Art. I, § 10) which forbids a State, without the consent of Congress, to “enter into any *agreement or compact* with another State”—saying that if actual agreements were not made, practises equivalent thereto might arise including some States and excluding others; or (2) from the proposition that the power of a State to surrender fugitives to another State is *derived* from the Constitution—thus mistaking the imposition of an obligation or duty for a grant of power; or (3) from the proposition that the Constitution having provided for surrenders contrary to the will of the State in some cases, it, therefore, excludes voluntary action or discretion by the State, not only in those cases, (as to which the conclusion from the premise may be conceded) but in *all* others—a conclusion which, admitting the premise, is as bad in policy as it is unwarranted in logic or in law.

We shall now proceed to point out the fallacies in such arguments.

1. The construction placed upon the clause of the Constitution relating to "agreements and compacts" between the States (U. S. Const., Art. I, § 10), indicates plainly that the surrender of an accused person by one State to another would not constitute entering into a compact or agreement, or come within the ban of the Constitutional mandate. The provision was intended merely to prohibit a State from entering into agreements or compacts with other States of such a nature as would increase its political power, encroach upon the supremacy of the United States or infringe the political prerogatives of the Federal Government.

Virginia v. Tennessee, 148 U. S. 503.

Wharton v. Wise, 153 U. S. 155.

Stearns v. Minnesota, 179 U. S. 223, 245
et seq.

Louisiana v. Texas, 176 U. S. 1, 17.

McHenry County v. Brady, 163 N. W.
540, 544.

Fisher v. Steele, 39 La. Ann 447, 454.

U. B. R. Co. v. E. T. etc. R. Co., 14 Ga.
327.

Barron v. Baltimore, 7 Pet. 243, 248.

A notable example of an "agreement" between States—if such it may be called—in the form of reciprocal legislation is illustrated by the case of *Commonwealth of Massachusetts v. Klaus* (145 App. Div. [N. Y.] 798), where it was held that a State statute which provided that the courts could order a witness to appear as such before a court in another adjoining State, which had reciprocal legislation on the subject, was valid, its validity being founded fundamentally upon the proposition that the State had the right to

compel a witness to attend in another—by virtue of its inherent reserved power. Its action did not infringe the Constitution.

If a State exacted reciprocity or mutual considerations as a condition for the delivery of accused persons to another State, there might be some basis for an argument in support of the position taken by HOUGH, J., in the *Kopel* case (*supra*). There might, in such a case, be some room for saying that this was the entering into a compact or agreement. Even then it would not be such an agreement as is prohibited.* But here there is nothing of the kind. And the apprehensions of the learned judge, to use the words of MR. JUSTICE BREWER, were “more of imagination than of fact” (*Stearns v. Minnesota*, 179 U. S. 223, 242). Would it not be better to wait for an instance than to pronounce anticipatory judgment upon theoretical suppositions that will, in all probability, never become realities?

Again, digressing slightly from the main topic, but considering a kindred subject, it will be noticed that the provision of the Constitution relating to the surrender of fugitives from justice is not, like, for example, the power to regulate commerce, to establish post offices and post roads, declare war, punish piracies on the high seas, etc. (U. S. Const., Art. I, § 8), a grant or delegation of power to the general government. The function of inter-state rendition is essentially a *State*, and not a *Federal*, function, (XVIII Am. Law Rev. 690-692; *Robb v. Connolly*, *supra*; U. S. Rev. Stat. § 5278)—a proposition forcibly illustrated by the decision of this court in *Kentucky v. Dennison* (24 How. 66), where it was held that, although the *obligation* to surrender was unqualified, and existed irrespective of the nature

* *Fisher v. Steele*, 39 La. Ann. 447, 454.

of the crime charged, the Federal government was, nevertheless, without power to enforce it. The process is a *State* process. The rendition is effected by *State* governmental agencies—both as respects demand and surrender. In *every* feature of the Constitutional provision and the Act of Congress the idea of *STATE* sovereignty is emphasized and brought into prominence.†

Considerations which might arise in determining the validity of State action in respect of matters that come within the scope of a delegated power, such, for example, as the regulation of inter-State commerce, with respect to which the Federal government has acted, are, therefore, not pertinent here *; and this because the function of inter-State rendition is distinctively a *State*, and not a *Federal* function and because interstate rendition is *not* a delegated power over which Congress is given direct and general control.‡ And the surrender of an accused person by one State to another can hardly be said to be calculated to constitute an interference with the functions of the Federal government, with the supremacy of the United States, or with the exercise of its political prerogatives. A denial of the power of the State in this respect would more likely be “attended with permanent inconvenience or public mischief” than an upholding of

† Doubtless, Congress could devise means of enforcing the constitutional *obligation*.

*As to this it may be remarked that it has been held that “in construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.” (*Illinois Cent. R. R. Co. v. Pub. Util. Comm.*, Nos. 416, 448, Oct. Term, 1917.)

‡ *Ante*, pp. 86-88.

it (*Virginia v. Tennessee, supra*, 520)—as we shall hereafter show.

2. We have already indicated that the power to surrender fugitives was *not* derived from the Constitution—that it existed independently of it; and the inevitable conclusion to be deduced from that premise we shall now proceed to develop, referring particularly to the views of learned jurists and commentators.

In *Holmes v. Jennison (supra)*, MR. JUSTICE CATRON said:

“The constitution equally cuts off the power of the states to agree with each other, as with a foreign power; yet, it is notoriously true, that for the fifty years of our existence under the constitution, the states have, in virtue of their own statutes, apprehended fugitives from justice from other states, and delivered them to the officers of the state where the offence was committed; and this, independently of the fourth article and second section of the constitution, and the act of congress of 1793, ch. 51, which provides for a surrender on the demand of the executive of one state upon that of another. The uniform opinion heretofore has been, that the states, on the formation of the constitution, had the power of arrest and surrender in such cases; and that *so far from taking it away, the constitution had provided for its exercise, contrary to the will of a state, in case of an unjust refusal*; thereby settling, as amongst the states, the contested question whether on a demand, the *obligation* to surrender was perfect and imperative, or whether it rested on comity, and was discretionary.”

Like views were expressed by DAWSON, J., in *Knowlton's Case (supra)*, where, speaking of the Federal rendition laws, he said:

“While this is the paramount law on the subject, binding upon all states, yet, doubtless, it is competent for the several states, by statute, to

provide other conditions not repugnant thereto, upon which fugitives may be delivered. That is to say, a state, if it choose, may require its executive to surrender fugitives upon terms less exacting than those prescribed in the act of congress."

In *Dennison v. Christian* (*supra*) [aff'd 196 U. S. 637] the Court said:

"The power to arrest and surrender a fugitive from justice is not dependent upon the Constitution, since it existed prior to the adoption of that instrument. It was recognized among the states under the confederation, and, even before the confederation, among the colonies. *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717-727. It seems to be reasonable to suppose that the state Legislatures have power to authorize extradition *between the states*, independently of the provisions of Congress upon that subject."

In *Matter of Fetter* (*supra*), GREEN, C. J., said [384-385]:

"In considering this question, it is material to observe that this clause of the constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right. It makes obligatory upon every member of the confederacy the performance of an act which previously was of doubtful obligation. All writers upon the law of nations agree that it is the right of every sovereign state to expel from its territory, or to surrender to another nation in amity with it, an offender against the laws of such friendly nation. No state is bound to harbor criminals within its bosom, but may at its option surrender them to the government against whose laws they have offended. Whether any government is bound to make such surrender upon the demand of the sovereign of another nation in amity with it, upon the principle of the comity of nations, is another question, upon which jurists and courts are not agreed.

It is held by some writers of high authority upon the law of nations that such duty does exist *: Vattel, b. 2, c. 6, sec. 76; 2 Burlam. 179, secs. 23, 27; Story's Confl. L., sec. 627."

* * * * *

"But whatever difference of opinion may exist in regard to the *obligation* resting upon one nation to surrender a fugitive from justice, upon the demand of another nation in amity with it, there is no denial and no question of the right of every sovereign nation to surrender fugitives within its territory. The whole effect of the constitution was to confer upon each member of the confederacy a *right to demand* from every other member of the confederacy a fugitive, and to make obligatory the surrender which was before discretionary. If, then, there exists, independent of constitutional provision or treaty obligation, a right in every sovereign state to surrender criminals against the laws of other countries, there must also, of necessity, exist in every state the power of arresting and detaining such fugitive. The mere power of surrender, without the power of arrest and detention, would be nugatory. It is remarkable, indeed, that both the constitution and the act of congress of 1793 assume that the one power is a necessary consequence of the other. Neither the constitution nor the law confers, except by implication, the power of arrest or imprisonment."

To carry the doctrine of the exclusiveness of the Federal law further than to exclude State legislation calculated to obstruct or impede it, would, if it were continued to its logical conclusion, result in condemning as unconstitutional all State legislation making provision for the preliminary arrest and detention of persons whose surrender might ultimately be sought. Legislation of that character exists in many, if not all, of the States [*vid. Burton v. N. Y. C. &*

* This is not the generally accepted modern doctrine.

H. R. R. Co., Oct. Term, 1917, No. 71, 72, and cases collected in the footnote to the opinion of MR. JUSTICE BRANDEIS]; and its validity has never—except in a *dictum* of STORY, J., in *Prigg v. Pennsylvania*, 16 Pet. 539, 617—been seriously doubted, and may now be regarded as firmly settled (Moore on Extradition, Vol. II, § 542; *Burton v. N. Y. C. & H. R. R. Co.*, *supra*). The principle which supports such legislation as valid, likewise supports the right of the State to deliver the accused, in the exercise of its police power, if it sees fit to do so (*Matter of Fetter*, 23 N. J. L. 311, 315). To deny the one power is to deny the other. To admit the one is to admit the other. The basis of each is the same—the reserved sovereign power of the State, which, so long as it does not *conflict* with the paramount law on this subject, may be exercised to the fullest extent.

Another line of cases which illustrate and, upon analysis, support the proposition for which we contend, are those in which a prisoner has been brought back to a State for trial by extra-legal methods—kidnapping, forcible abduction, and the like—and in which it has been held that the prisoner's removal in such manner affords him no basis upon which to found a claim of a violation of constitutional rights (*Ker v. Illinois*, 119 U. S. 436; *Mahon v. Justice*, 127 U. S. 700; *Pettibone v. Nichols*, 203 U. S. 192). The decisions in these cases are referable, upon analysis, to the proposition that the state from which the prisoner was taken might have ordered him out of its territory, or delivered him up, even though no obligation devolved upon it to do so (*Ker v. Illinois*, 119 U. S. 436, 442); and taking with this the further consideration that, as between two States of the Union, the prisoner has no so-called

right of asylum (*Innes v. Tobin*, 240 U. S. 127), and may be tried for an offense other than the rendition offense (*Lascelles v. Georgia*, 148 U. S. 537), added emphasis is given to the proposition as between two States. Upon analysis, such decisions rest upon the proposition that the State from which the prisoner was taken had inherent power, upon a showing of less than would require it to surrender, to acquiesce in the removal or, what is equivalent thereto, to order the removal—to surrender.

In an interesting article by Mr. C. P. McCarthy, in XIX GREENBAG, 636-644, he presents potent arguments in support of this power of surrender. This was reviewed in the HARVARD LAW REVIEW, Vol. XXI, 225, where the reviewer says:

"Mr. McCarthy believes that the states may legislate to produce the result. This opinion seems correct. It is disputed on the ground that because interstate rendition depends upon the federal constitution, no person can be surrendered unless the case falls within the constitutional provision. This is fallacious. To imprison or to remove from its territory such persons as it sees fit is unquestionably an inherent power of every sovereignty. Before the Constitution, or in the absence of any provision on the subject, each state in the exercise of its sovereignty could surrender criminals or refuse to do so at its discretion. It does not follow, then, that because the Constitution requires it to surrender them in some cases, it has lost its discretion in the remaining cases. Otherwise, no effect would be given to the Tenth Amendment, which reserves to the states all power in local affairs not granted. Again it is argued that the view contended for would be destructive of national homogeneity, as making possible agreements between some states to the exclusion of others.

That argument would apply equally to any legislation conferring favors on outsiders. For example, some states have lent to outsiders their machinery to secure testimony from persons within their boundaries; but that practice has never been decried, nor has our national homogeneity disappeared. In short, statutes of this nature need not have the suggested effect—it is only possible that they may be so drawn as to have such effect. At least half the dicta and the only decision found at all in point are with the view advocated. It is also supported by several analogies. Thus the Constitution does not require the states to hold fugitives from justice before demand is made, but still the states may do so. And the states may provide the method of the arrest—a fact which again shows that the states are not *excluded* from legislating on this subject.” *

* Looking at the full faith and credit clause of the Constitution and the Act of Congress passed pursuant thereto (U. S. Rev. Stat., § 905) it will be seen that although the Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State” and that “the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof.*” it has been held that these provisions do not preclude the several States from establishing other less exacting modes of proving in their own courts the records of other states (Chase’s Stephen’s Digest, Art. 80, pp. 203-204; *Kingman v. Cowles*, 103 Mass. 283, 284). And notwithstanding that Congress has provided that the records and judicial proceedings of other States “shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State from which they are taken*” (U. S. Rev. Stat., § 905—U. S. Comp. Stat., § 1519), it has been held that, with respect to a subject over which the States possessed full power at the time of the adoption of the Constitution and in respect of which they did not delegate authority to the general government, a State might give to a decree in such a matter only the efficacy which its own conception of duty and public policy might justify; and that, in the exercise

In XVIII AM. LAW REVIEW 690, it is said:

"There is not a line in the Federal Constitution which indicates that any State entering into the Federal compact parted with the power to surrender fugitives from the justice of any other State, Territory, or organized community existing within the territorial limits of the United States. All that there is in the Federal Constitution on this subject simply affirms and makes obligatory the duty of exercising this power. It affirms, but does not restrain or take away; and it is nonsense to hold, as some courts have held, that, by affirming, it excludes what it does not affirm. * * * Possibly the United States has power to execute the obligation of surrendering fugitives from justice among the States by its own officers and its own process, just as it undertook in this way in the fugitive slave law to execute the obligation of surrendering fugitives from labor. But until it undertakes to exercise this power, the process of interstate extradition, though directed by an Act of Congress, is State process and not Federal process, and the Federal courts have no more to do with its execution than the courts of Great Britain have." *

of its reserved power, and applying its own conception of public policy, it might, without violating the full faith and credit clause of the Constitution, refuse to give to a decree of another State the efficacy which it had in the State where it was rendered (*Haddock v. Haddock*, 201 U. S. 562). This, as will appear from the argument, is, in some respects, a broader exercise of State power than would be involved in the surrender of an accused person—a power which the States also possessed at the adoption of the Constitution and did not delegate to the general government. The surrender of an accused person, so far from denying full faith and credit to the judicial proceeding of another State, has a direct tendency to accord it. And the power if applied to its own citizens as to those of other States would not deny the "privileges and immunities" (*Paul v. Virginia*, 8 Wall. 168; *People v. Griswold*, 213 N. Y. 92, 98-99).

* *Vid. Kentucky v. Dennison*, 24 How. 66.

Here a consideration of policy suggests itself. Under the Federal Constitution [Art. IV, § 2], as it now reads, it is (when we consider that the provision thereof only relates to the delivery of persons who "flee from justice," *i. e.*, to persons who were physically present within the territory of the demanding State and departed therefrom) doubtful, to say the least, whether Congress could constitutionally legislate respecting the surrender of persons who were merely "constructively present" in the State whose penal laws were violated. And yet we find that with the modern facilities of communication—open to the evil-doer no less than to the well-disposed—offences against the criminal laws of States, by persons who do not find it necessary to be within a State to put in effect their criminal schemes and operations there, are ever upon the increase. Occasionally—we might say, frequently—it happens that a person in one State commits a crime in another *without ever setting foot upon its soil*. Ingenuity keeps pace with crime. The skillful criminal is ever on the alert for what he considers loopholes in the law (*vid. People v. Arnstein*, 211 N. Y. 585). Sometimes he cannot be prosecuted in the State where he started his evil forces (*State v. Hall*, 114 N. C. 909); and, if the Federal Constitution and the Act of Congress relating to inter-State rendition be deemed *exclusive*, he *could not* be extradited to the State whose laws he violated.

While it may sometimes happen that the State upon whose territory he was when he put the machinery in motion which resulted in the consummation of the crime in another State, or when he procured the "agent" to effect it there, may, by virtue of statutes making his conduct an

offense against *its own* penal laws, take jurisdiction and punish the offender (*People v. Botkin*, 132 Cal. 231; *People v. Zayas*, 217 N. Y. 78), such action by the State is not unattended with difficulties (*People v. Arnstein*, 211 N. Y. 585; *People v. Zayas*, 217 N. Y. 78); and in the absence of legislation making the conduct an offence against the State which seeks to punish the offender he could not be punished therefor at all—even though his crime might be one of the most serious known to the law (*State v. Hall*, 114 N. C. 909; 115 N. C. 811)—for it is a principle of general acceptance that a state (although it may lend the aid of its tribunals for the enforcement of extra-territorial contracts or the redress of extra-territorial torts, and will determine the rights and liabilities of the parties according to the *lex loci*) will not take cognizance of, give extra-territorial effect to or enforce the *penal* laws of another state or sovereignty (*The Antelope*, 10 Wheat 66, 123; *Huntington v. Attrill*, 146 U. S. 657, 666, 667, 672, 699; *State v. Hall*, 114 N. C. 909; Wharton, *Crim. Law* [11th Ed.] § 310; Moore *Int. Dig.* Vol. 2 § 202). When a State undertakes to punish a transaction as a crime, *its own* penal laws are the sole criterion by which its criminality is to be determined (*People v. Zayas*, 217 N. Y. 78; *Comm. v. Macloon*, 101 Mass. 1). To punish the offender it must make his conduct an offense *against itself*.

True it is that the States have a wide latitude in determining what they shall declare to be offenses against their laws—against themselves. Indeed we have the authority of TAXEY, C. J., for the proposition that the States of the Union “may, if they think proper, in order to deter offenders from other countries from coming

among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction" (*Holmes v. Jennison*, 14 Pet. 540, 568, 569), thus giving his sanction to what is called the "UNIVERSALITY OF JURISDICTION," a theory of criminal jurisdiction under which a State may assume jurisdiction of all crimes against either itself or other states, by all persons at all places. The existence of such a jurisdiction, regard being had to the customs and usages of the civilized world, was combatted and forcibly denied by the French Court of Cassation, even where the victim of the crime was a citizen of the country which sought to punish the criminal (*Fornage's Case*, Moore Int. Dig. Vol. 2, § 202. See also *The Apollon*, 9 Wheat 362; *People v. Merrill*, 2 Park Crim. Rep. [N. Y.] 590, 598).

Jurisdiction is, however, after all, a question of power (*McDonald v. Mabec*, 243 U. S. 90, 91), and "the power existing in every body politic is an absolute despotism" (*Livingston v. Moore*, 7 Pet. 469, 546)—but considerations of natural justice and fair play might well restrain a State from taking jurisdiction of an offence as a crime against itself if all that happened in its territory was that the offender was there at the time, his real wrong being elsewhere.

Again under the theory of what is called "PERSONAL JURISDICTION," a State may punish its own subjects or citizens for crimes, defined to be such by its own laws, committed abroad when they re-enter its territory. Doubtless, that is within the competency of all sovereign states. That theory, although some examples of its application are contained in our legislation, has found but slight acceptance in America—for reasons of convenience and policy.

But the point (apart from the broad powers of sovereignty) which we desire to illustrate and emphasize in this connection is that, however wide may be the power of a State to assume jurisdiction of offenses, or to make offenses against itself transactions which were in fact committed elsewhere than on its soil, and to punish them when it has hold of the offender, yet, as a general rule, POLICY would not only justify it in declining jurisdiction in such cases, but, regard being had to considerations of natural justice, ordinarily would require it to do so.

And while a State, having regard to what is called the "TERRITORIAL THEORY" of criminal jurisdiction, might take jurisdiction of and punish transactions begun upon its soil but consummated and *having their effect* elsewhere, and this irrespective of whether or not they were criminal by the law of the place of consummation (*People v. Zayas, supra*), or, having regard to what is called the "SUBJECTIVE THEORY," if the offender was on its territory when the crime was committed, it might well, in POLICY, refuse to make such transactions offenses against its own laws and punishable in its own courts—especially where what was done on its soil was some incidental thing, innocent in itself, and not disturbing to its peace or dignity. Or even if what was done upon its territory was a substantial act of wrong, such as the making of false pretences, which resulted in the obtaining of the money *elsewhere*, it might yet consider—having regard to the generally accepted rule of the common law that the jurisdiction attached where the unlawful result occurred—that the offense was punishable, and should be punished, where the transaction took effect and the primary or REAL WRONG was

done, and, consequently, decline to enact enabling legislation to permit it to punish such transactions as offenses against itself (*Stewart v. Jessup*, 51 Ind. 413; *Cruthers v. State*, 161 Ind. 139; *Graham v. People*, 181 Ill. 477; *Connor v. State*, 29 Fla. 455). The adoption of such a policy could not justly give rise to adverse criticism. To punish a transaction as a crime, a State would, in all cases have to make it, by *its own* laws, a crime *against itself*—for, as we have noted, no state will undertake to enforce the *penal* laws of another.

The “REAL THEORY” of criminal jurisdiction, as it has been called by its advocates, is that jurisdiction is taken, not because the offender was at the time of the crime within the territory of the offended sovereign, nor because he was at the time a subject [or citizen] of such sovereign, “*but because his offense was against the rights of that sovereign, or of his subjects*”—“we punish all who offend on our soil, because our duty is to attach to crime *committed within our borders* its retribution” (Wharton, *Crim. Law* [11th Ed.]. Note p. 415, § 331).

With the present day multiplicity of crimes in the various States, many of them declared to be such because of peculiar local conditions, the different States could hardly be expected to pass legislation permitting them to take jurisdiction and punish as offenses against themselves or their own laws all transactions made criminal by the laws of other states—because the offender was on their soil when he committed the offense, and thus could not be (as it is contended) extradited to the State where his wrong was accomplished, he at the time remaining outside its territory. Public policy would not require a

State to take jurisdiction of such offenses. On the contrary it would prevent it doing so. Justified as a State would be in refusing jurisdiction of civil actions on grounds of policy (*Bond v. Hume*, 243 U. S. 15) it would be more than justified in not taking jurisdiction of crimes which, looking at the "objective," were in reality extra-territorial—for to do so it would have to transform the transactions into crimes against itself.

But the denial to a State of the power to surrender to another State a person who violated the criminal laws of the latter, and who should *there* be punished for his crime, merely because he was not physically on the territory of the State whose laws he violated, and in which he accomplished his unlawful object, has no support in policy—and, we submit, it has none in law. State action, supplementing State obligation imposed by the Constitution, and surrounded by the necessary safeguards of "due process," is the remedy against a growing evil—and the adoption of it falls within the reserved power of the States. *There is nothing in the Constitution which, either expressly or by implication, forbids it.*

A notable instance of a murderer going scot free was the case of *Hall*, who, while in North Carolina, fired a shot across the border and killed a man in Tennessee. North Carolina could not punish him (*State v. Hall*, 114 N. C. 909). Tennessee had no right to insist upon compliance with its demand for his surrender (*State v. Hall*, 115 N. C. 811). North Carolina was unable to give him up—because of the lack of a *local statute* permitting it to surrender him, the general theory in our law being that the executives—our government being fundamentally a government of laws with the sovereign power vested in the People, who act through their legislative assem-

blies—will act in such matters only by *legislative* sanction.

The Supreme Court of North Carolina, did not doubt the *power* of the State to guard against offenders like Hall going free in future cases. It pointed to the remedy, saying [p. 818]:

“In the exercise of its reserved sovereign powers the State may, as an act of comity to a sister State, provide for the surrender upon requisition of a person, who, like the prisoners, are indictable for murder in another State, *though they have never fled from justice.*”

The same doctrine was enunciated in the dissenting opinion [p. 824]. The court in that case discharged the prisoner because of the lack of a local enabling statute.

But in the case at bar the State of New York has acted, and whether the local statute (N. Y. Code Crim. Pro. § 827) [see Appendix] is susceptible of a construction that will permit a surrender, even though the Constitution and the Act of Congress do not require it, or, indeed, whether or not there is a statute in existence at all, is immaterial here. The only question with which this Court is concerned, in this connection, is whether the State of New York has power, consistent with the Constitution of the United States, to surrender the prisoner. If such power exists, and it is a valid power, the State must be deemed, so far as THIS COURT is concerned, to have exercised it, and to have acted in conformity with its local law.

To construe the Constitution so as to deny the existence of such a power in the State would not be conducive to that “more perfect union” to form which the Constitution was ordained and

established, or to that "indestructible Union of indestructible States" to which "in all its provisions" the Constitution looked (*Texas v. White*, 7 Wall. 700, 725; *Keller v. United States*, 213 U. S. 138, 139). A bad result suggests a wrong construction.

IN CONCLUSION.

If the writ of error be not dismissed, the judgment should be affirmed.

Respectfully submitted,

EDWARD SWANN,

District Attorney,

New York County.

ROBERT S. JOHNSTONE,

Assistant District Attorney.

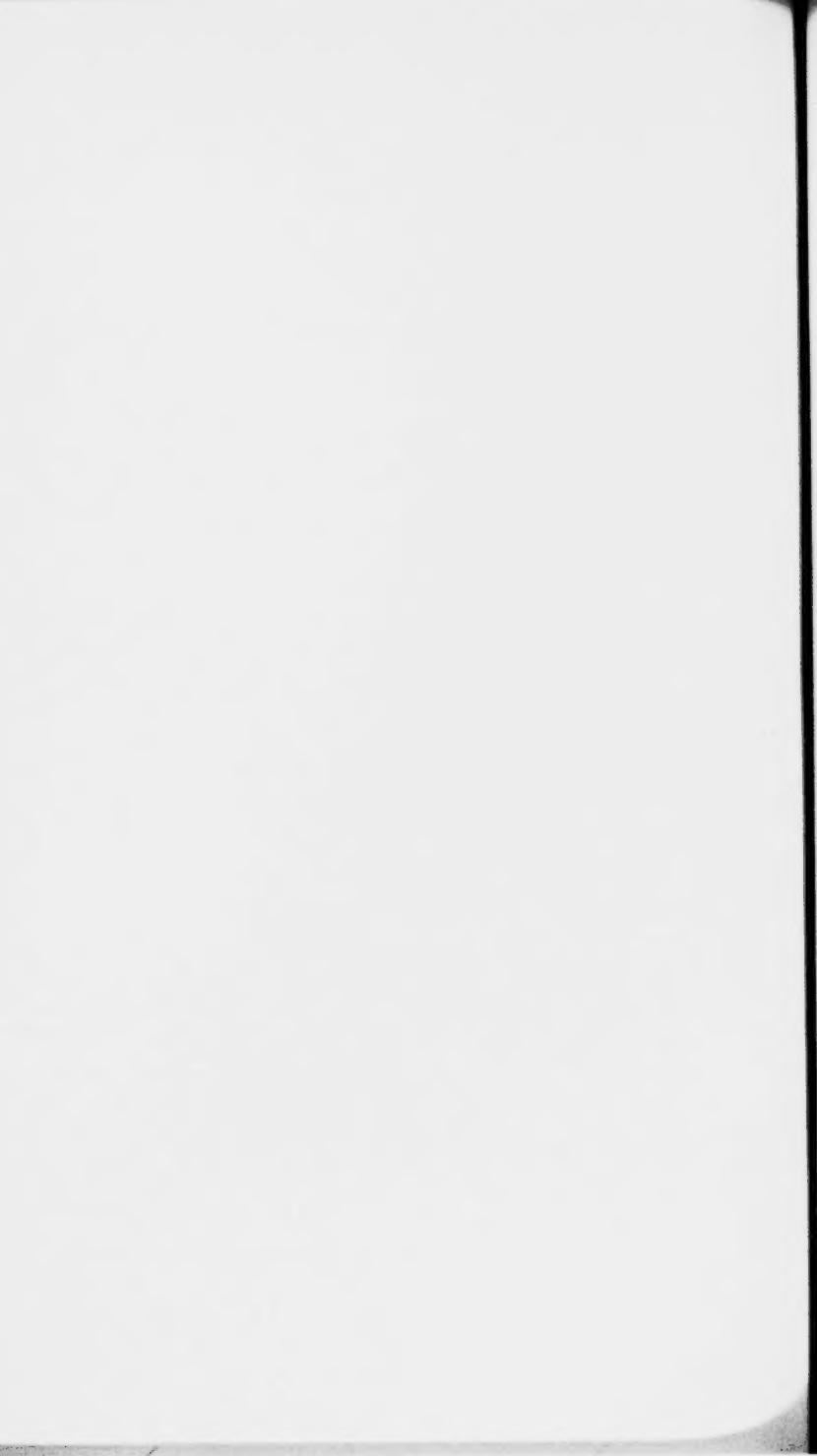
ROBERT D. PETTY,

DON CARLOS BUELL,

Deputy Assistant District Attorneys,

Counsel for Defendant-in-error.

March, 1918.



APPENDIX.**N. Y. Code Crim. Pro., § 827.**

“§ 827. It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant or temporary resident of this state is to be arrested, as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment or information from the authorities of such other state or territory, charging such person with treason, felony or crime in such state or territory), to issue and transmit a warrant for such purpose to the sheriff of the proper county or his under sheriff, or in the cities of this state (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police) to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction shall be competent to make service of or execute the same. The governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and intrusted the execution of the governor's warrant must, within thirty days from its date, unless sooner requested, return the same and make return to the governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this state, or of any city, county, town or village thereof, must, upon request of the governor, furnish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

2. Before any officer to whom such warrant shall be directed or intrusted shall deliver the per-

son arrested into the custody of the agent or agents named in the warrant of the governor of this state, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the supreme court, or a county judge, who shall, in open court if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the governor thereon, he or they may have a writ of habeas corpus upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said court or a judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the governor, and one of the judges aforesaid or a counselor at law of this state, and such waiver shall be immediately forwarded to the governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against, and mentioned in the requisition, the accompanying papers and the warrant issued by the governor thereon, then the court or judge shall order and direct the officer intrusted with the execution of the said warrant of the governor to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant issued thereon, as the agent or agents upon the part of such state to receive him or them; otherwise to be discharged from custody by the court or judge. If upon such hearing the warrant of the governor shall appear to be defective or improperly executed, it shall be by the court or judge returned to the governor, together with a statement of the defect or defects, for the purpose of being corrected and returned to the court or judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall

be held in custody until such hearing be finally disposed of.

3. It shall not be lawful for any person, agent or officer to take any person or persons out of this state, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings aforescribed, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this state, for the purpose of taking him or sending him to another state, without a requisition first duly had and obtained, and without a warrant duly issued by the governor of this state, served by some officer as in this section provided, and without, except in case of waiver in writing as aforesaid, taking him before a court or judge as aforesaid, unless in pursuance to the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats or undue influence, persuade any citizen, inhabitant or temporary resident of this state to sign the waiver of his right to go before a court or judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction be sentenced to imprisonment in a state prison or penitentiary for the term of one year. Any willful violation of this act by any of the above-named officers shall be deemed a misdemeanor in office.